YEAR IN REVIEW

Alaska Supreme Court and Court of Appeals Year in Review 1995

I. INTRODUCTION

Year in Review contains brief summaries of selected decisions by the Alaska Supreme Court and the Alaska Court of Appeals. The primary purpose of this review is to familiarize practitioners with significant decisions handed down by these courts in 1995. The summaries focus on the substantive areas of the law addressed, the statutes or common law principles interpreted and the essence of each of the holdings. Space does not permit review of all cases decided by the courts this year, but the authors have attempted to highlight decisions signaling a departure from prior law or resolving issues of first impression. The cases that were omitted applied well-settled principles of law or involved narrow holdings of limited import. The appendix lists the omitted cases. Attorneys are advised not to rely upon the information contained in this review without further reference to the cases cited.

The opinions have been grouped according to general subject matter rather than by the nature of the underlying claims. The summaries are presented in the following fourteen areas of the law: administrative, business, civil procedure, constitutional, criminal, election, employment, environmental, family, permanent fund dividend, property, tax, torts and trusts and estates.

II. ADMINISTRATIVE LAW

A. General

In *State ex rel. Dew v. Superior Court*,[1] the Alaska Supreme Court held that where the state files a paternity action pursuant to the Soldiers' and Sailors' Civil Relief Act ("SSCRA")[2] on behalf of a mother or a minor child, the state, rather than the superior court, must initially compensate counsel appointed to represent the defendant.[3] The superior court had determined that former

1. 907 P.2d 14 (Alaska 1995).

2. The SSCRA provides that a member of the armed services is entitled to appointed counsel before a default judgment is entered against him or her. *Id.* at 15 n.2.

3. *Id.* at 15.

Administrative Rule 12(d)(2)(B)(vii),[4] then applicable, authorized the court to order the state to advance fees for SSCRA-appointed counsel. The state argued that the superior court should advance the compensation because there was no statutory authority for a court to order the state to make such a payment. The supreme court disagreed, holding that the determination of who advances SSCRA counsel fees is a matter of "practice and procedure" in courts and that former Administrative Rule 12(d)(2)(B)(vii) granted the courts the power to make that determination.[5]

In *Alaska Public Utilities Commission v. Municipality of Anchorage*,[6] the supreme court held that the Alaska Public Utilities Commission ("APUC") has implied statutory authority to order telephone utilities to return to consumers a portion of the revenues the utilities gained by charging rates not filed with and set by APUC.[7] However, because APUC's implied statutory authority was limited to setting "just and reasonable" rates, it had no power to make the utilities refund moneys beyond that which would make the rate "reasonable."[8] To penalize a utility company further, APUC must use the civil sanction provided by Alaska Statutes section 42.05.571.[9]

The court cited public policy reasons and similar rulings by other courts for its holding that APUC had statutory authority to require a refund. The policy reasons most persuasive to the court were that (1) the telephone companies would have no incentive to comply with APUC filing requirements if APUC could not directly refund revenues to customers and (2) such a refund provides a quick, easy way to compensate consumers.[10]

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4. Former Administrative Rule 12(d)(2)(B)(vii) has been amended and renumbered as Administrative Rule 12(c)(2) (1994). The former rule provided that courts may appoint attorneys "for absent service persons pursuant to the [SSCRA] when the opposing party is financially unable to pay for such representations." *Id.* at 15 n.4.

5. *Id.* (quoting ALASKA CONST. art. IV, § 15).

6. 902 P.2d 783 (Alaska 1995).

7. *Id.* at 784-85.

8. *Id.* at 789.

9. *Id.*; ALASKA STAT. § 42.05.571 (1989) (providing for a maximum penalty of $100 to be levied against public utilities for each violation of chapter 42 of the Alaska Statutes).

10. *Alaska Pub. Util. Comm'n*, 902 P.2d at 788.

In *Lazy Mountain Land Club v. Matanuska-Susitna Borough Board of Adjustment and Appeals*,[11] the supreme court held that municipalities, pursuant to Alaska Statutes sections 29.40.030(b) and 29.40.040, must adopt and validly enact comprehensive plans before adopting zoning regulations.[12] The court noted that the "'logic' of requiring planning to precede . . . individual land use decisions" was already present in the context of public land management. Thus, the court extended the logic to the context of municipal land use management.[13]

Lazy Mountain Land Club ("LMLC") desired to operate land as a disposal site for construction and demolition wastes, but it was denied a conditional use permit required by a municipal zoning ordinance, Matanuska-Susitna Borough Code section 17.60.030.[14] In the supreme court, LMLC argued that the zoning ordinance was invalid because it was not enacted pursuant to a comprehensive plan that itself had been enacted by ordinance. Although "the Matanuska-Susitna Borough Comprehensive Development Plan," which the borough claimed constituted a "comprehensive plan," was adopted as a resolution rather than an ordinance,[15] the court found that the "plan was validly enacted when it was incorporated by reference into a later borough ordinance."[16] As a result, the borough's zoning ordinance was valid.

In *Municipality of Anchorage v. Coffey*,[17] the supreme court held that the Municipality of Anchorage Police and Fire Retirement Board had incorrectly concluded that a claimant's disability was non-occupational.[18] Under the substantial evidence test, the court would have deferred to the Board's decision if conflicting medical opinions on the claimant's condition had existed.[19]

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11. 904 P.2d 373 (Alaska 1995).

12. *Id.* at 378-79; ALASKA STAT. §§ 29.40.030(b), 29.40.040 (1992).

13. *Lazy Mountain Land Club*, 904 P.2d at 378.

14. *Id.* at 376. Matanuska-Susitna Borough Code section 17.60.030 requires a conditional land use permit for land uses that are "potentially damaging to the property values and usefulness of adjacent properties and/or potentially harmful to the public health, safety and welfare," including the land uses of "junkyards and refuse areas." *Id.*

15. *Id.* at 381.

16. *Id.* at 381-82. Matanuska-Susitna Borough Code section 15.24.030(B) incorporated the 1970 plan by reference. *Id.*

17. 893 P.2d 722 (Alaska 1995).

18. *Id.* at 724.

19. *Id.* at 728.

However, since every opinion stated that the claimant's injury was occupational, substantial evidence supported a conclusion opposite to that of the Board.[20]

B. Open Meetings Act

In *Revelle v. Marston*,[21] the Alaska Supreme Court applied the test set out in *Alaska Community Colleges' Federation of Teachers, Local No. 2404 v. University of Alaska*[22] for determining the appropriate remedy in the event of a decision made in violation of the Open Meetings Act.[23] The Mayor of Anchorage terminated Revelle as Head Librarian for the municipality based upon an evaluation by the Library Advisory Board, which occurred at a meeting that was found to be in violation of the Open Meetings Act.[24] The superior court applied the *Federation of Teachers* test, which states that when full and fair reconsideration of a decision made in violation of the Open Meetings Act is impossible without invalidating it, the court must perform a balancing test to determine whether invalidation of the decision is in the public interest.[25] The test required the court to weigh the "remedial benefits to be gained in light of the goals of the [Open Meetings Act] against the prejudice likely to accrue to the public."[26] The superior court ordered Revelle reinstated for a 120-day cooling-off period to allow for a reevaluation of Revelle's performance.[27] However, it did not award him the back pay and benefits he sought; after applying the *Federation of Teachers* test, it ruled that such an award would not be consistent with the public interest.[28]

The supreme court found that in denying the award, the superior court had considered only the public's right to be informed as a goal of the Act, thus determining that awarding back pay and benefits to an individual were unrelated to this goal.[29] The supreme court stated that maximizing informed and principled

20. *Id.*
21. 898 P.2d 917 (Alaska 1995).
22. 677 P.2d 886 (Alaska 1984).
23. ALASKA STAT. § 44.62.310(a) (1993).
24. *Revelle*, 898 P.2d at 919-20.
25. *Id.* at 922.
26. *Id.* (quoting Alaska Community Colleges' Federation of Teachers, Local No. 2404 v. University of Alaska, 677 P.2d 886, 893 (Alaska 1984)).
27. *Id.* at 920.
28. *Id.*
29. *Id.* at 922.

decision-making and deterring future violations were also goals of the Act. The court held that the superior court should have taken these goals into account when balancing the "remedial benefits to be gained" in light of the goals of the Open Meetings Act against the likely prejudice to the public, and remanded the issue of back pay and benefits for such consideration.[30]

In *Von Stauffenberg v. Committee For an Honest and Ethical School Board*,[31] the supreme court concluded that allegations contained in a recall petition failed to state legally sufficient grounds to recall certain elected municipal officials.[32] The Committee for an Honest and Ethical School Board sought to remove from office five members of the Haines Borough School Board, alleging in their recall petition that the Board members committed misconduct by convening in a closed door executive session to consider retaining the borough's elementary school principal.[33] The court noted that although government meetings are required to be open under the Alaska Open Meetings Act,[34] the statute makes an exception for "subjects that tend to prejudice the reputation and character of any person."[35] The court held that because "there is no law which precludes public officials from discussing sensitive personnel matters in closed door executive sessions,"[36] the Committee's grounds for recall did not allege a violation of law and, therefore, lacked sufficient particularity.[37]

C. Fish and Game

In *Kodiak Seafood Processors Ass'n v. State*,[38] the Alaska Supreme Court determined that the Commissioner of the Alaska Department of Fish and Game could allow a private fisher, who had participated in an experimental fishing operation, to keep and sell fish caught during the operation as consideration for his participation.[39] The court's interpretation expands the Commis-

30. *Id.* at 923-25.
31. 903 P.2d 1055 (Alaska 1995).
32. *Id.* at 1060.
33. *Id.* at 1057.
34. ALASKA STAT. § 44.62.310 (1993).
35. *Id.* § 44.62.310(c)(2).
36. 903 P.2d at 1060 n.13.
37. *Id.* at 1060.
38. 900 P.2d 1191 (Alaska 1995).
39. *Id.* at 1197.

sioner's authority under Alaska Statutes section 16.05.050(15),[40] which explicitly allows the Commissioner to sell any fish caught during test fishing operations and to give the proceeds to a private fisher as consideration for participating in the test.[41]

Kodiak Seafood Processors Association ("KSPA") appealed from a summary judgment order declining to enjoin a private fisher from dredging for scallops in an area closed to commercial scallop fishing.[42] This dredging had been authorized by a special permit issued to the private fisher by the Commissioner.[43] KSPA argued that by allowing the fisher to keep and sell the fish, the Commissioner's issuance of the permit was a de facto regulation that illegally opened a commercial fishery for a single person.[44] The court disagreed, reasoning that "[t]here is no material difference between allowing the private fisher to sell the catch and having the Commissioner sell the catch and give the proceeds to the private fisher."[45]

In *Peninsula Marketing Ass'n v. Rosier*,[46] the supreme court held that the emergency powers of the Commissioner of the Department of Fish and Game, outside the context of a true biological emergency, did not implicitly include a general veto power over decisions of the Board of Fisheries.[47] The court concluded that inferring such a broad veto power from the statutory grant of emergency power would conflict with other statutory provisions. Specifically, it would nullify explicit statutory grants of power, render useless the statutory provisions dividing power and authority between the Commissioner and the Board and make meaningless the statutory device for resolving conflicts between the two.[48] In other words, if such powers were inferred, the Board would become a "rubber stamp or advisory body for the Commissioner."[49] On the face of this case, the court found that the Board had effectively made a final determination not to lower the chum salmon harvest cap, as proposed by the Commissioner,

40. ALASKA STAT. § 16.05.050(15) (1992).
41. *Kodiak Seafood Processors Ass'n*, 900 P.2d at 1197.
42. *Id.* at 1193.
43. *Id.*
44. *Id.* at 1197.
45. *Id.*
46. 890 P.2d 567 (Alaska 1995).
47. *Id.* at 573; ALASKA STAT. § 16.05.060(a), (b) (1992).
48. *Peninsula Mktg. Ass'n.*, 890 P.2d at 573.
49. *Id.*

because a majority of the Board voted to approve a fishery management plan without any chum cap reduction.[50] The court held that the Commissioner could not use his emergency powers to institute a reduced cap in the absence of new information or events not considered by the Board.[51]

D. Local Boundary Commission

In *Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Commission*,[52] the supreme court held that Alaska Statutes section 29.05.100(a)[53] requires the Local Boundary Commission ("LBC") to make a preliminary finding that the boundaries of a proposed borough do not comply with statutory standards before it may alter those boundaries.[54] In addition, the court held that the LBC could find such non-compliance if the proposed boundaries do not "maximize common interests" pursuant to the Alaska Constitution,[55] which requires that each borough "embrace an area and population with common interests to the maximum degree possible."[56] In determining whether common interests are maximized, the LBC has broad discretion.[57] In the present case, the LBC shifted the boundaries for the proposed Borough of Yakutat because it believed that portions of the proposed area lacked sufficient ties to other parts of the proposed borough and had more in common with another area.[58] The court concluded that by shifting the boundaries, the LBC made an implied finding that the originally proposed boundaries did not maximize common interests.[59] Therefore, the LBC acted within its authority when it altered the boundaries.

In *Keane v. Local Boundary Commission*,[60] the supreme court interpreted Alaska Statutes section 29.05.021(b)[61] to hold that

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50. *Id.* at 574.
51. *Id.*
52. 900 P.2d 721 (Alaska 1995).
53. ALASKA STAT. § 29.05.100(a) (1992).
54. *Yakutat*, 900 P.2d at 725.
55. *Id.*
56. ALASKA CONST. art. X, § 3.
57. *Yakutat*, 900 P.2d at 726.
58. *Id.* at 726-27.
59. *Id.* at 727.
60. 893 P.2d 1239 (Alaska 1995).
61. Alaska Statutes section 29.05.021(b) provides: "A community within a borough may not incorporate as a city if the services to be provided by the

when a community proposes to incorporate, the LBC must inquire into the reasonableness of having the borough within which the community is located provide necessary services. If the provision of services by the borough is reasonable and practicable, the borough should provide them and the application for incorporation should be denied.[62] However, the court explicitly stated that this interpretation of section 29.05.021(b) should not be construed to mean that a city should only be incorporated when it is impossible for a borough to provide services.[63] This would leave the LBC powerless to approve the incorporation of any new city that is located within an organized borough.[64] Moreover, the court emphasized the existence of both statutory and constitutional preferences for the incorporation of cities over the establishment of new service areas.[65] The court remanded the case to the LBC to determine whether the borough could reasonably provide services.[66]

III. BUSINESS LAW

A. Commercial Law

In *Von Gemmingen v. First National Bank of Anchorage ("Von Gemmingen II")*,[67] the Alaska Supreme Court clarified its earlier holding in *Von Gemmingen v. First National Bank of Anchorage ("Von Gemmingen I")*[68] by holding that a debtor's judgment creditor could recover from a bank only the amount of the debtor's interest in an escrow account held by the bank.[69] In *Von Gemmingen II*, First National Bank of Anchorage held escrow accounts in the names of various judgment creditors of the debtors. The debtors, in turn, had assigned the proceeds from these accounts to various other creditors. Von Gemmingen, a judgment creditor of the debtors, served a writ of attachment on the bank. The bank

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proposed city can be provided on an areawide or nonareawide basis by the borough in which the proposed city is located . . . ."

62. *Keane*, 893 P.2d at 1244.
63. *Id.*
64. *Id.* at 1244 n.10.
65. *Id.* at 1244.
66. *Id.* at 1246.
67. 890 P.2d 60 (Alaska 1995).
68. 789 P.2d 353 (Alaska 1990).
69. *Von Gemmingen*, 890 P.2d at 60.

continued to honor the prior assignments and to charge its regular escrow fees. It applied any surplus funds in the escrow accounts to the benefit of the judgment creditor.[70]

Von Gemmingen challenged the bank's handling of the accounts, asserting the right to the full amount paid into the levied accounts. The bank argued that Von Gemmingen was entitled only to the amount in the accounts remaining after payment was made to the prior assignee-creditors and service charges were satisfied.[71] The court agreed with the bank's interpretation, noting that the assignment of the debtors' rights in the escrow account modified the interests of the judgment debtors in the escrow account and excluded the amount assigned from subsequent attachment by judgment creditors.[72]

B. Insurance

In *Maynard v. State Farm Mutual Automobile Insurance Co.*,[73] the supreme court held that an insurance company may seek reimbursement for medical expenses paid to an insured where (1) the medical expenses were incurred as a result of action by a tortfeasor, (2) the insurer also represents the tortfeasor and (3) the insured brings an action against the tortfeasor seeking compensation for the same medical expenses.[74] Alaska case law traditionally prohibited insurance companies from seeking subrogation against their own insureds.[75] This rule was based on cases involving situations "in which the insurer paid out a loss to its insured and then sought to hold a second coinsured party under the same contract liable for the loss."[76] The *Maynard* court distinguished those prior cases which, unlike *Maynard*, did not involve two separate insurance policies—that of the injured party and that of the tortfeasor.[77] The language of one of the policies in *Maynard*, that between Maynard and the insured, specifically provided that the insurer was entitled to reimbursement to the extent that Maynard recovered from a third party for medical expenses.

70. *Id.* at 61.
71. *Id.* at 63.
72. *Id.*
73. 902 P.2d 1328 (Alaska 1995).
74. *Id.* at 1333.
75. *Id.* at 1332.
76. *Id.*
77. *Id.*

Moreover, the court found that the existence of two insurance policies minimized the potential for conflicts of interest, which were of concern in prior cases dealing with subrogation by an insurance company against its own insureds. In those prior cases, there was a great danger that an insurance company would abuse its fiduciary obligations with respect to a coinsured's duty to cooperate with the insurance company's investigation of a claim under a policy. Conflicts of interest arose because the insurance company might use information discovered as a result of one coinsured's duty to cooperate to establish the liability of another coinsured under the same policy. However, in *Maynard*, the court found that potential conflicts of interest were not as great because under Maynard's policy, the insurance company was automatically entitled to reimbursement of any medical expenses recovered by Maynard. The court reasoned that any investigation by the insurance company would be limited to determining the amount and reasonableness of medical expenses, and thus there was little chance that conflicts of interest would arise.[78] Finally, the court concluded that it would not be equitable to preclude the insurance company from seeking reimbursement because that would permit the insured to receive double recovery for the medical expenses.[79]

In *Fulton v. Lloyds*,[80] the supreme court held that where two insurance companies underwrote the same policy, both were liable if either violated any duty it owed to the insured.[81] Because there was only one policy issued and the insured paid only one premium, the insured "reasonably would expect both insurers to be responsible for and bound by decisions made in the direction of litigation or negotiations."[82] While the two insurance companies might have had a different private understanding, such an understanding "would do nothing to change the impression conveyed by the language of the policy that there would be only one defense to which both insurers would be bound since there was only one policy."[83]

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78. *Id.* at 1331-33.

79. *Id.* at 1334.

80. 903 P.2d 1062 (Alaska 1995).

81. The first insurance company covered the first $200,000 of the policy, and the second insurance company provided $300,000 in excess insurance. *Id.* at 1064.

82. *Id.* at 1069.

83. *Id.*

In *Columbia Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*,[84] the supreme court reaffirmed its decision in *Werley v. United Services Automobile Ass'n*[85] that where "other insurance" clauses[86] conflict, the loss is prorated between the insurers up to their respective policy limits.[87] State Farm Insurance Co. insured a car owned by Jackie Lee. Lee permitted Jim Burks, Sr., who was insured by Columbia Mutual Insurance Co., to drive the car. While driving the car, Burks collided with a motorcycle carrying two persons. The insurance policy underwritten by Columbia contained an "other insurance" clause that provided coverage only in excess of "other collectible insurance" if Burks had an accident driving a car he did not own.[88] In contrast, the State Farm policy stated that it covered only a prorated share of any loss resulting from an accident involving Lee's car.[89]

The supreme court concluded that these policies conflicted because neither policy provided "primary" insurance.[90] Because the polices conflicted, the court concluded that *Werley* controlled, and the loss had to be prorated. In determining how the loss should be prorated, the court determined that it should be shared on a per-accident basis.[91] That is, because two people were injured, State Farm was potentially liable for $200,000, its per person policy limit, while Columbia was potentially liable for $110,000. According to the court's per accident calculation, the total coverage was $310,000, and Columbia was liable for 11/31 of it.[92]

In *Johnson & Higgins of Alaska, Inc. v. Blomfield*,[93] the supreme court held that expert testimony is not necessary to

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84. 905 P.2d 474 (Alaska 1995).

85. 498 P.2d 112 (Alaska 1972).

86. An "other insurance" clause is a clause in an insurance policy that limits coverage when other insurance policies also provide coverage. The "other insurance" clauses may conflict when, by their terms, they purport to limit insurance because of the existence of one another. *See Columbia Mut. Ins. Co.*, 905 P.2d at 475.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 477.

91. *Id.*

92. *Id.*

93. 907 P.2d 1371 (Alaska 1995).

determine whether an insurance agent was professionally negligent in advising a customer about an insurance policy because an insurance agent's work qualified as a "non-technical [field] where negligence is evident to lay people."[94]

In *D.D. v. Insurance Co. of North America*,[95] the supreme court determined that a physician is entitled to coverage and legal representation pursuant to his business owner's insurance policy if he is sued for referring a patient to a colleague in his building who sexually assaults her.[96] The plaintiff alleged that Dr. Erkmann was negligent as a business owner because he knew or should have known that the referred doctor had a history of inappropriate sexual behavior with patients. Since the complaint alleged facts that gave rise to a possibility that Erkmann would be liable under his business owners policy, the court found that Erkmann's insurer had a contractual duty to represent him.[97] The court also found that a gynecologist's sexual assault of a patient does not "arise out of medical treatment," and therefore did not fall under the insurance policy's exclusion of injuries "arising out of . . . medical . . . treatment."[98]

C. Contracts

In *Bauman v. Day*,[99] the Alaska Supreme Court held that the "discovery rule" should be applied to determine the beginning of the statute of limitations in common law contract claims. The plaintiffs purchased property from the defendants in 1984, unaware that it had permafrost-related problems.[100] Though the problem was discovered in 1988, the plaintiffs did not bring suit until 1992.[101] Because the statute of limitations for common law contract claims was six years, the claim would be time-barred if the statute of limitations began at the time of breach rather than at the time of discovery.[102] The court found that policy reasons favored adopting the discovery rule for common law contract claims.

94. *Id.* at 1374 (quoting Kendall v. State, 692 P.2d 953, 955 (Alaska 1984)).
95. 905 P.2d 1365 (Alaska 1995).
96. *Id.* at 1368.
97. *Id.* at 1367-68.
98. *Id.* at 1368-70.
99. 892 P.2d 817 (Alaska 1995).
100. *Id.* at 820.
101. *Id.* at 828.
102. *Id.* at 822.

Specifically, the court concluded that the defendant should not benefit from the plaintiff's ignorance simply because the breach is difficult to ascertain.[103]

In *Aetna Casualty & Surety Co. v. Marion Equipment Co.*,[104] the supreme court held that the Alaska "anti-indemnity" statute[105] applies to leases of construction equipment, rendering indemnity agreements in such leases unenforceable.[106] Marion had leased a construction hoist to Howard S. Wright Construction Company, a general contractor. A component of the hoist crushed the arm of James Crane, a subcontractor's employee.[107] After defending and settling Crane's lawsuit against Wright, Aetna brought an indemnity claim against Marion pursuant to an indemnity provision in the hoist lease agreement between Marion and Wright.[108]

The court found that the "anti-indemnity" statute, which governed agreements "contained in, collateral to, or affecting" construction contracts, applied to the equipment lease in question.[109] The court based its finding on an analysis of the weight of authority in other states with similar anti-indemnity statutes, the language of the Marion-Wright lease and the "anti-indemnity" statute's goal of increasing safety at construction sites.[110]

After concluding that the anti-indemnity statute was applicable, the court concluded that the statute rendered Aetna's indemnity claim unenforceable because Aetna sought indemnity for an injury that resulted from Wright's "wilful misconduct" and "sole negligence."[111] The court held that "wilful misconduct" in the context of the statute means "volitional action taken either 'with a knowledge that serious injury to another will probably result, or

103. *Id.* at 828.

104. 894 P.2d 664 (Alaska 1995).

105. ALASKA STAT. § 45.45.900 (1994) (prohibiting indemnification agreements in construction contracts that "purport[] to indemnify the promisee against liability for damages . . . arising . . . from the sole negligence or wilful misconduct of the promisee or the promisee's agents.").

106. *Marion Equip. Co.*, 894 P.2d at 666-70.

107. *Id.* at 665.

108. *Id.* at 666.

109. *Id.* at 666-70 (quoting ALASKA STAT. § 45.45.900 (1994)).

110. *Id.*

111. *Id.* at 670.

with wanton and reckless disregard of the possible results'."[112] Because the jury found that Wright showed reckless indifference to the employee's interests and safety, the court concluded that Wright's conduct constituted wilful misconduct.[113]

In *Stormont v. Astoria, Ltd.*,[114] the supreme court examined a lease and option to purchase badly deteriorated property including an eleven-unit apartment complex. Two months after leasing the property from Astoria, Stormont received notice from the City of Fairbanks that the apartment complex would be demolished,[115] whereupon Stormont sought rescission of the contract on the basis of mistake, frustration and misrepresentation.[116] Astoria counterclaimed for past due lease payments.[117]

The supreme court rejected Stormont's argument that neither party had anticipated the demolition of the building, stating that errors concerning future events do not justify rescission.[118] The court separately considered Stormont's allegations that the parties were mistaken about the severity of the building's problems.[119] Although the court found that the building's suitability for commercial leasing went to the heart of the contracts, the court held that because Stormont accepted the premises in "as is" condition, it was not clear that he received something "fundamentally different from what the parties believed he would."[120] The court further held that the presence of numerous "as is" clauses in the contracts suggested that Stormont agreed to bear the risk of mistake.[121]

The court noted that frustration is an affirmative defense in which the party pleading it bears the burden of proof.[122] Acknowledging that allocation of risks is an important consideration when such a defense is pleaded, the court concluded that although

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112. *Id.* at 671 (quoting Rost v. United States, 803 F.2d 448, 450 (9th Cir. 1986)).
113. *Id.*
114. 889 P.2d 1059 (Alaska 1995).
115. *Id.* at 1060.
116. *Id.* at 1059-60.
117. *Id.* at 1060.
118. *Id.* at 1061 (citing RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1981)).
119. *Id.*
120. *Id.* at 1061-62.
121. *Id.* at 1062.
122. *Id.* at 1063.

the contracts did not explicitly mention demolition, Stormont had assumed the risk that the building would not be suitable for his purposes.[123] Therefore, the court held that Stormont had not met his burden of proving frustration.[124]

In *Kopanuk v. AVCP Regional Housing Authority*,[125] the supreme court held that a hybrid Housing and Urban Development ("HUD") program contract created at least potential equitable interests in the home buyer and therefore was outside of the district court's jurisdiction.[126] Kopanuk had entered into an agreement with the Association of Village Council Presidents Regional Housing Authority entitled a "Mutual Help and Occupancy Agreement" ("MHOA") as part of a HUD-sponsored program.[127] In 1992, the Association initiated a forcible entry and detainer action seeking to evict Kopanuk for an alleged breach of the MHOA.[128] Kopanuk argued that the contract was an installment contract for the sale of land rather than a lease agreement with an option to purchase, and therefore equitable interests were at stake.[129] The supreme court decided that although HUD described the program as a lease, the contract created potential equitable interests, which precluded the district court from hearing the case. Specifically, the court suggested that equity might exist since the program required a non-refundable contribution of land as a type of down payment (in this case contributed by a Native corporation), and also that a person who maintains land over a number of years may have equity in the appreciated value of the property.[130]

In *Wholesale B. V. v. State*,[131] the supreme court explained its earlier order affirming a superior court's order that allowed the Anchorage International Airport ("AIA") to cancel its solicitation of bids for the duty-free concession at the airport.[132] AIA had

123. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1981)).
124. *Id.*
125. 902 P.2d 813 (Alaska 1995).
126. *Id.* at 817. District courts do not have jurisdiction over "actions of an equitable nature, except as otherwise provided by law." ALASKA STAT. § 22.15.050 (2) (1988).
127. *Kopanuk*, 902 P.2d at 815.
128. *Id.*
129. *Id.* at 816.
130. *Id.* at 817.
131. 908 P.2d 994 (Alaska 1995).
132. *Id.* at 995.

sought bids and decided to award the contract to the second-highest bidder, determining that the high bidder lacked sufficient retail experience.[133] The high bidder protested that the bidding requirements were ambiguous and that there was an appearance of impropriety.[134] In response, AIA cancelled bid solicitation and rejected all bids, claiming that such action was "in the best interest of the State" in light of the allegations of ambiguity and impropriety together with the high costs and delays associated with resolving those allegations.[135] The supreme court acknowledged that AIA's discretion to cancel bid solicitation is broad,[136] but refused to rule whether ambiguity alone would have justified its doing so. Furthermore, the court agreed with AIA that continuing the bid solicitation process was not in the state's best interest due to the combined effect of the ambiguity in the bidding requirements, the admitted appearance of impropriety and the state's interest in protecting public confidence in the bidding process.[137] Because awarding a contract would not have been in the state's best interest and because AIA had broad discretion to cancel a solicitation for bids in such circumstances, the supreme court affirmed the superior court's order dismissing all actions challenging AIA's decision.[138]

IV. CIVIL PROCEDURE

A. General

In *Hofmann v. von Wirth*,[139] the Alaska Supreme Court held that prejudgment interest should not be added to civil damages until a demand for payment is made. At trial, the superior court ordered Hofmann to reimburse von Wirth for one-half of the expenses she had incurred in maintaining a piece of property that the formerly married couple held as tenants in common.[140] In addition, the trial court assessed prejudgment interest against Hofmann for the amounts expended.[141]

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133. *Id.* at 996.
134. *Id.* at 997.
135. *Id.*
136. *Id.* at 999 (citing 17 ALASKA ADMIN. CODE tit. 40, § 340(e)(5) (1995)).
137. *Id.*
138. *Id.* at 1004.
139. 907 P.2d 454 (Alaska 1995).
140. *Id.* at 455.
141. *Id.*

The supreme court stated that interest is owed by a debtor from the date the debt is due or the debtor refuses to pay.[142] Because Hofmann was unaware of the payments made by von Wirth, he cannot be said to have failed his obligation to pay for the upkeep of the property until a demand was made which gave him notice of his debt.[143] The court held that a demand was necessary for interest to begin to accrue and remanded the case to determine when such demand was made.[144]

In *Jackinsky v. Jackinsky*,[145] the supreme court held that a declaratory judgment action has no res judicata effect where (1) there was never any "actual litigation of the issues"[146] or (2) the conduct giving rise to a subsequent suit post-dates the conclusion of the earlier action.[147] In 1985, the Jackinsky family filed suit against Timothy Jackinsky to obtain a declaratory judgment that Timothy held a certain shore fishery lease in trust for the family. The suit was settled by a court order entitled "stipulation to dismiss" which provided that Timothy would transfer the lease to another member of the Jackinsky family.[148] In 1992, Timothy and Sara Jackinsky filed suit against various other members of the Jackinsky family, claiming an interest in the shore fishery leases held by those members. Those family members moved to dismiss the suit by arguing that under the doctrine of res judicata, the 1992 suit was barred by the 1985 suit.[149]

The supreme court cited sections 33 and 27 of the Restatement (Second) of Judgments in ruling that only "the determination of actually litigated issues will have preclusive effect in later litigation,"[150] and that "an issue is actually litigated when it is raised and submitted for determination."[151] Thus, based on these principles, the 1984 suit did not bar the 1992 suit because the suit was never litigated; it was settled.

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142. *Id.*
143. *Id.* at 456.
144. *Id.* at 457.
145. 894 P.2d 650 (Alaska 1995).
146. *Id.* at 655 (quoting Dale v. Greater Anchorage Borough, 439 P.2d 790 (Alaska 1968)).
147. *Id.* at 656 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (1982)).
148. *Id.* at 652.
149. *Id.* at 653.
150. *Id.* at 655.
151. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. d (1982)).

The court also concluded that the 1992 suit was not barred by the 1984 suit because the events underlying the 1992 suit occurred after the 1984 suit was settled. Because the parties could not have had a fair opportunity to litigate those new facts in 1984, it would not be appropriate to preclude the litigation of them in 1992.[152]

Finally, the court concluded that because the 1984 settlement agreement addressed only Timothy's transfer of his lease, it did not manifest an intent to resolve any issues relevant to the 1992 suit, and therefore had no res judicata effect.[153]

In *Alaska Telecom, Inc. v. Schafer*,[154] the supreme court held that Alaska's long-arm statute[155] is co-extensive with the due process clause of the Fourteenth Amendment[156] by virtue of its catch-all clause, which states that the statute's jurisdictional grounds are "cumulative and in addition to any other grounds provided by the common law."[157] Thus, in borderline personal jurisdiction cases that do not fit within the grounds explicitly described in the statute, courts must construe Alaska's jurisdiction according to the due process requirements of the Fourteenth Amendment.[158] Therefore, (1) the defendant must have minimum contacts with the forum state, and (2) the maintenance of the suit must be consistent with fair play and substantial justice.[159] In Schafer's case, sufficient minimum contacts existed because Schafer had formed a contract with an Alaskan, solicited a contract with an Alaskan entity, negotiated by telephone to Alaska, executed the written contract in Alaska, performed a significant portion of his services under the contract in Alaska, mailed his invoices to Alaska for payment and been paid by checks drawn on an Alaskan bank.[160] Maintenance of the suit in Alaska was consistent with notions of fair play and substantial justice because, where Schafer's business activities showed that doing business with an Alaska entity was not burdensome, it followed that responding to a lawsuit in Alaska would not be unreasonably burdensome.[161]

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152. *Id.* at 656-57.
153. *Id.* at 655.
154. 888 P.2d 1296 (Alaska 1995).
155. ALASKA STAT. § 09.05.015 (1994).
156. *Schafer*, 888 P.2d at 1299; U.S. CONST. amend. XIV, § 2.
157. *Id.* ALASKA STAT. § 09.05.015(c) (1994).
158. *Schafer*, 888 P.2d at 1299.
159. *Id.* at 1300-01.
160. *Id.* at 1301.
161. *Id.*

In *Bromley v. Mitchell*,[162] the supreme court held that although a domiciliary of a state is generally entitled to litigate in the state of his or her domicile,[163] in order to withstand a claim of forum non conveniens, the individual must make at least a minimum showing that it is more convenient to litigate in the state of domicile than in another.[164] Mitchell, a Washington resident, sued Bromley, an Alaska resident, in Washington for unpaid repairs on a boat Bromley had purchased.[165] Bromley then sued Mitchell in Alaska superior court for breach of contract on the sale of the boat.[166] Having won his case in Washington, Mitchell filed motions for summary judgment and dismissal because of forum non conveniens in Alaska.[167] The superior court dismissed Bromley's claim.[168]

In affirming the dismissal, the supreme court examined five factors relevant in a forum non conveniens determination: "(1) ease of access to proof; (2) availability and cost of witnesses; (3) the possibility that the forum was chosen to harass; (4) the enforceability of the judgment; and (5) the burden on the community of litigating matters not of local concern."[169] The court noted that the superior court had properly considered these factors and found none of them weighed in Bromley's favor.[170] The court also reasoned that, although the doctrine remains applicable when the plaintiff is a domiciliary, forum non conveniens motions are generally granted only in exceptional cases.[171] The plaintiff's choice of forum will be honored only when the plaintiff makes "a real showing of convenience."[172] Bromley made no such showing.[173]

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162. 902 P.2d 797 (Alaska 1995).
163. *Id.* at 802.
164. *Id.*
165. *Id.* at 799.
166. *Id.*
167. *Id.*
168. *Id.* at 799-800.
169. *Id.* at 801 (citing Crowson v. Sealaska Corp., 705 P.2d 905, 908 (Alaska 1985)).
170. *Id.* at 802.
171. *Id.* at 800.
172. *Id.* at 802.
173. *Id.*

In *State v. United Cook Inlet Drift Ass'n*,[174] the supreme court rejected the *Mendoza* exception[175] as a valid exception to the state's ability to raise non-mutual offensive collateral estoppel.[176] The court distinguished the current application of the exception, which applies to litigation involving the federal government, from its proposed application to litigation involving the state. Currently, the exception applies where: (1) it is desirable to have several courts of appeals consider an issue before the U.S. Supreme Court hears it; (2) the government needs flexibility in determining when to appeal and (3) it is desirable to preserve policy choices for successive administrations.[177] The Alaska Supreme Court found that none of these factors were relevant to litigation involving the state of Alaska. First, unlike federal courts, a superior court's jurisdiction is statewide, and a litigant can appeal as of right. Therefore, the court concluded that there was no need to allow an issue to percolate before an appeal.[178] Second, unlike the federal government, the state of Alaska litigates in only one jurisdiction and is responsible for a smaller number of cases. Thus, there is less need for flexibility in choosing only the strongest case to appeal.[179] Finally, the court concluded that the third *Mendoza* factor- preservation of public policy choices for successive administrators- "does not carry significant weight."[180]

Notwithstanding its rejection of *Mendoza*, the supreme court recognized a limited exception to the application of collateral estoppel against the state on "unmixed questions of law."[181] Relying on section 29 of the Restatement (Second) of Judgments, the court explained that in cases of general interest, relitigation of

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174. 895 P.2d 947 (Alaska 1995).

175. In *United States v. Mendoza*, 464 U.S. 154 (1984), the U.S. Supreme Court adopted an exception to the application of non-mutual offensive collateral estoppel against the federal government.

176. *United Cook Inlet*, 895 P.2d at 957. The requirements for non-mutual offensive collateral estoppel are "(1) [t]he issue to be precluded from relitigation must be identical to that decided in the first action [and] (2) [t]he issue in the first action must have been resolved by a final judgment on the merits." *Id.* at 950. Alaska courts generally do not require mutuality between the parties; however, mutuality may nevertheless be required in the interest of fairness. *Id.* at 951.

177. *Id.*

178. *Id.* at 951-52.

179. *Id.*

180. *Id.* at 952.

181. *Id.*

questions of law, unmixed with facts previously litigated, allows for wiser formulations and further development of law and is therefore allowable.[182] It also noted that this exception is strengthened when the issue to be precluded involves a government agency responsible for administering laws applicable to many similarly situated persons.[183] In this case, the court determined that the exception applied because the issue of law in question was a statement by a superior court that "all Alaskans are subsistence users" of fish populations.[184] The supreme court determined that the issue was of general interest and affected all Alaskans; therefore, it permitted the state to relitigate it.[185]

In *Staso v. State Department of Transportation*,[186] the supreme court held that a refiled suit, which is assigned a new docket number, for which new filing fees are imposed, and for which new process must issue, is a new "action" for the purposes of Alaska Rule of Civil Procedure 42(c),[187] even if the refiled suit is identical to a case dismissed under Rule 16.1(g).[188] Plaintiff Michael Staso had attempted peremptorily to disqualify a judge assigned to the case he had refiled.[189] In order to facilitate future litigants' determinations of whether they have a right under Rule 42(c) to disqualify a judge assigned to a refiled case, the court adopted the bright-line rule stated above. In light of this new rule, Staso was allowed peremptorily to disqualify the judge in the newly filed case.[190] The court stressed that the rule should not apply to collateral or later proceedings in the same case.[191]

In *McGilvary v. Hansen*,[192] the supreme court vacated as disproportionately severe a sanction striking the pleadings of and imposing liability on a defendant in a personal injury suit where the

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182. *Id.* at 952-53 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) (1982)).

183. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. i (1982)).

184. *Id.* at 949 (citing Morry v. State, No. 2BA-83-87 Civ. (Alaska Super., May 23, 1991).

185. *Id.* at 954.

186. 895 P.2d 988 (Alaska 1995).

187. ALASKA R. CIV. P. 42(c)(setting out procedures by which a litigant may disqualify an assigned judge).

188. *Staso*, 895 P.2d at 990.

189. *Id.* at 989.

190. *Id.* at 993.

191. *Id.* at 991.

192. 897 P.2d 605 (Alaska 1995).

defendant inaccurately responded to a discovery request.[193] Plaintiffs Betty and Clarence Hansen filed suit against the operators of a tour bus in which Mr. Hansen was injured during an accident. In a written interrogatory, the plaintiffs requested from the defendant a list of all passengers on the bus. The defendant responded that no such list existed, but in the process of deposing certain employees of the defendant, the Hansens discovered that the defendant in fact had such a list, which was then provided to the Hansens.[194] In response to the Hansens' subsequent motion for sanctions, the court found that the defendant's failure to provide the names of passengers was willful, struck the defendant's pleadings and imposed liability for the injury on the defendant.[195]

The supreme court vacated the sanctions order, observing that prior cases "narrowly define the permissible range within which a trial court may impose litigation-ending sanctions."[196] Specifically, a court must find that the non-complying party willfully committed the discovery violation in question, and a court must also explore possible alternatives to dismissal prior to imposing litigation-ending sanctions.[197] The court held that the trial court abused its discretion in striking the defendant's pleadings because it failed to consider any lesser sanction or remedy, such as a continuance of discovery and an award of costs resulting from the violation.[198] In addition, the court noted that the discovery error did not gravely prejudice the Hansens, given that the requested information was eventually provided to them before the close of discovery.[199] Therefore, the court concluded that in light of the availability of other sanctions and remedies, the liability sanction was excessively severe.[200]

In *White Mountain Mining Partners v. Ptarmigan Company, Inc.*,[201] the supreme court applied the three-part test developed in *Underwriters at Lloyd's London v. The Narrows*[202] in determin-

193. *Id.* at 607.
194. *Id.* at 605-06.
195. *Id.* at 606.
196. *Id.* at 607 (citing Highes v. Bobich, 875 P.2d 749, 752 (Alaska 1994)).
197. *Id.* (citing Underwriters at Lloyd's London v. The Narrows, 846 P.2d 118, 119-20 (Alaska 1993)).
198. *Id.*
199. *Id.*
200. *Id.*
201. 906 P.2d 1357 (Alaska 1995).
202. 846 P.2d 118, 119-20 (Alaska 1993).

ing that the trial court did not abuse its discretion in entering litigation-ending sanctions.[203] Before a court may conclusively resolve an issue against a party who has not complied with discovery orders, the *Underwriters* test provides that (1) the court must find a willful violation of the discovery order (2) the record must "indicate[] a reasonable exploration of possible and meaningful alternatives" and (3) there must be "a sufficient relationship between the discovery materials and the case."[204] The court found that the record supported the superior court's finding that the defendant's noncompliance was willful because he had disobeyed two separate court orders to turn over certain tax returns. In addition, the superior court had considered possible and meaningful alternatives to the sanctions in that it imposed monetary fines upon the defendant, after which he still failed to turn over the requested documents. Finally, the discovery materials were sufficiently related to the issue litigated because the tax returns requested may have contained financial information central to the plaintiff's allegation of fraud.[205]

In *In Re Mendel*,[206] the supreme court outlined the appropriate procedures for *in camera* review of documents where there is a claim of attorney work product privilege. The superior court had held Mendel in contempt for refusing to produce her unredacted billing records even though she had claimed the work product privilege and had offered a redacted version.[207] The supreme court determined that the use of *in camera* review of the documents was a less intrusive procedure than requiring production of the records in open court.[208]

According to the supreme court, a superior court should, after conducting its *in camera* review, "redact the attorney's mental impressions, conclusions, opinions or legal theories as well as any privileged attorney-client communications which are unrelated to

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203. *White Mountain Mining*, 906 P.2d at 1362.

204. *Id.*

205. *Id.* at 1363. With respect to a second sanctions order, which related to a separate set of documents, the court determined that the superior court had failed to make a finding as to the sufficiency of the relationship between the documents and the issues to be litigated. Therefore, it remanded the case for findings on that question. *Id.* at 1364.

206. 897 P.2d 68 (Alaska 1995).

207. *Id.* at 75.

208. *Id.*

the subject matter of the litigation."[209] The attorney should be allowed to review the redacted materials and present arguments as to why any of the unredacted material is protected by privilege.[210] Only after this procedure has been followed should the court require the production of the relevant unprivileged information.[211]

In *Beilgard v. State*,[212] the supreme court reaffirmed its decision in *Shaw v. State Department of Administration*,[213] in which it held that public policy prohibited a convicted criminal from imposing liability on others for the consequences of his antisocial behavior.[214] In doing so, the court dismissed a civil claim against the state based on his conviction on criminal charges, which he blamed on the negligence of the state.[215] The plaintiff was a Wyoming resident, engaged in the hunting and guiding business, who sought to arrange a hunting trip to Alaska for some of his clients.[216] Pursuant to this plan, he wrote the Alaska Department of Fish and Game to request information relating to applicable state laws and license requirements.[217] The plaintiff corresponded with the Department several times in the ensuing months,[218] but ultimately became disgruntled with the pace at which it was processing his requests. Therefore, he proceeded with the hunting trip without having obtained all of the necessary licenses.[219] He was then arrested and convicted for guiding and transporting hunters without a license.[220]

Subsequent to his conviction, Beilgard sued Alaska in tort, alleging that the state's negligence in failing promptly to answer his inquiries and process his requests had led to his arrest in front of important clients and caused him to lose business.[221] On

209. *Id.*
210. *Id.*
211. *Id.*
212. 896 P.2d 230 (Alaska 1995).
213. 861 P.2d 566 (Alaska 1993).
214. *Beilgard*, 896 P.2d at 234.
215. *Id.* at 233-34.
216. *Id.* at 231.
217. *Id.*
218. *Id.*
219. *Id.* at 232-33.
220. *Id.*
221. *Id.* at 233.

appeal, the supreme court held that the action was contrary to public policy and was, therefore, properly dismissed by the trial court.[222]

In *Andrews v. Bradshaw*,[223] the supreme court held that a trial judge abused her discretion in precluding a defendant from testifying at trial because his attorney had failed to comply with a court order directing the attorney to make the defendant available for deposition before the trial.[224] At a conference two weeks before the trial was scheduled to begin, Judge Greene found that it was unclear whose fault it was that defendant Andrews had not yet been deposed,[225] but decided that because the plaintiff had been prejudiced as a result, the defendant's attorney was obligated to make Andrews available for a deposition before the trial.[226] Judge Greene stated that Andrews could be deposed telephonically if necessary but emphasized that he would not be allowed to testify if his deposition was not taken.[227] Thereafter, Andrews's attorney apparently forgot about the order, and the deposition was not taken.[228] On the first day of the trial, plaintiff's counsel requested that the presiding judge, Judge Beckwith, prohibit Andrews from testifying for failure to comply with Judge Greene's order, and the trial judge granted that request.[229] The jury returned a verdict for the plaintiff, and the defendant appealed.[230]

The supreme court held that the trial judge had failed to consider the reasonableness of prohibiting Andrews from testifying in light of all of the circumstances and remanded the case for a new trial.[231] In its view, Judge Greene had envisioned the cooperation of both parties in arranging the deposition of Andrews on such short notice.[232] She certainly had not intended to shift the entire burden for making such arrangements from the deposing party, where it would ordinarily be, to the party being deposed.[233] The court concluded that because plaintiff's counsel had also failed to

222. *Id.* at 234.
223. 895 P.2d 973 (Alaska 1995).
224. *Id.* at 974.
225. *Id.*
226. *Id.* at 975.
227. *Id.*
228. *Id.* at 976.
229. *Id.* at 975.
230. *Id.*
231. *Id.* at 976-77.
232. *Id.*
233. *Id.* at 976.

make any effort to arrange the deposition, he should not be allowed to reap the windfall of prohibiting the defendant's testimony.[234]

In *Brandon v. Hedland, Fleischer, Friedman, & Cooke*,[235] the supreme court invalidated a wrongful death settlement involving a minor because the superior court had failed to follow Alaska Rule of Civil Procedure 90.2, which requires that before a court accepts a settlement that compromises the claims of a minor, it must determine that the settlement is "fair and reasonable."[236] The case involved a settlement in 1990 of a paternity suit, in which Helen Carter and Eric Brandon withdrew their opposition to Catrina Crume's claim that their deceased son was her father. In return for the withdrawal, Carter and Brandon received a percentage of the proceeds of a wrongful death suit brought with respect to the son's death.[237] Two years later, the superior court relied on the 1990 agreement in distributing the settlement proceeds of the wrongful death suit.[238] However, the parties did not present the superior court with any factual basis for finding that the stipulation was "fair and reasonable," and the court made no such finding.[239]

B. Attorney's Fees

In *Eyak Traditional Elders Council v. Sherstone, Inc.*,[240] the Alaska Supreme Court held that the Eyak Traditional Elders Council was a public interest litigant and was therefore immune from an award of attorney's fees under Alaska Rule of Civil Procedure 82.[241] The Council had sought to prevent Sherstone, Inc. from clearcut harvesting a fifty-acre tract of timber that it believed was the location of an historic Eyak burial ground. Because Sherstone had completed its logging operations on the site during the litigation, thereby mooting the focus of the suit, the Council moved for, and was granted, voluntary dismissal. The

234. *Id.* at 977.
235. 902 P.2d 1299 (Alaska 1995).
236. ALASKA R. CIV. P. 90.2(a)(2).
237. *Brandon*, 902 P.2d at 1303.
238. *Id.* at 1313.
239. *Id.* at 1312.
240. 904 P.2d 420 (Alaska 1995).
241. *Id.* at 421; ALASKA R. CIV. PRO. 82 (providing a general fee-shifting rule for civil cases).

superior court then awarded Sherstone $10,000 in legal fees despite the Council's argument that it was immune from such an award because it had litigated issues of genuine public interest.[242]

The supreme court reversed, concluding that, although Alaska Rule of Civil Procedure 41(a)(2)[243] provided a basis upon which a trial court could award attorney's fees against a party that has successfully sought voluntary dismissal, such courts must still consider whether the party is a public interest litigant for the purposes of Rule 82.[244] The court then determined that the Council satisfied all four prongs of the public interest litigant test: (1) the court found that the plaintiffs sought to "effectuate strong public policies" (for example, seeking to compel the Alaska Department of Natural Resources to abide by statutory mandates pertaining to the use of land);[245] (2) "numerous people" would have "benefit[ed] from the lawsuit;"[246] (3) despite DNR's statutory authority to limit Sherstone's logging activities, "only a private party [could] have been expected to bring the suit"[247] and (4) the Council would not have had "sufficient economic motive to file suit even if the action involved only narrow issues lacking general importance."[248]

In another case involving Rule 82, *Abbott v. Kodiak Island Borough Assembly*,[249] the supreme court held that a group of homeowners who failed in their attempt to challenge a rezoning

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242. *Id.* at 421-22.

243. Alaska Civil Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

244. *Eyak*, 904 P.2d at 423. Alaska Rule of Civil Procedure 82 provides that "it is an abuse of discretion to award attorney's fees against a losing party who has in good faith raised a question of genuine public interest before the courts." *Id.* at 422.

245. *Id.* at 424.

246. *Id.* at 425. The court noted that the Alaska Historic Preservation Act evidenced the legislature's determination that "all Alaskans are harmed when the historical and cultural traditions of one of Alaska's native peoples are relegated to a museum wall."

247. *Id.* In *Southeast Alaska Conservation Council, Inc. v. State*, the court had held that the existence of governmental authority to act was not determinative of this prong of the public interest litigant test. Rather, where it is clear from the facts of the case that the state entity will not exercise enforcement powers, only a private party can be expected to bring the lawsuit.

248. *Id.* at 426.

249. 899 P.2d 922 (Alaska 1995).

decision did not qualify as public interest litigants and thus that attorney's fees could properly be awarded against them pursuant to Alaska Rule of Civil Procedure 82.[250] The homeowners had appealed the Kodiak Island Borough Assembly's decision to approve a housing development in their neighborhood, arguing that the rezoning would harm the environment, damage the character of the neighborhood and decrease property values.[251] The court held that the litigants met three parts of the four-part test governing qualification as a public interest litigant.[252] First, the owners' case was "partially designed to effectuate strong public policies," because they were concerned with environmental protection.[253] Second, numerous other people would have benefited had the owners succeeded with their claim.[254] Third, only a private party could have been expected to bring the suit.[255]

However, the court held that the owners failed to meet the fourth prong of the public interest litigant test because they would have had sufficient economic incentive to file the suit had the action involved only narrow issues without general importance.[256] The court noted that the owners had emphasized that the rezoning would amount to a taking without just compensation, would lower property values and would force them to fund local improvements.[257] The court therefore distinguished their case from cases in which litigants were concerned solely with health and safety issues.[258]

C. Arbitration

In *Ahtna, Inc. v. Ebasco Constructors, Inc.*,[259] the Alaska Supreme Court overruled prior cases[260] to hold that an arbitrat-

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250. *Id.* at 925.
251. *Id.* at 923.
252. *Id.* (citing Municipality of Anchorage v. Citizens for Representative Governance, 880 P.2d 1058, 1061-62 (Alaska 1994)).
253. *Id.* at 924.
254. *Id.*
255. *Id.*
256. *Id.* at 925.
257. *Id.* at 924.
258. *Id.* at 925.
259. 894 P.2d 657 (Alaska 1995).
260. *Id.* at 662 (citing Anchorage Medical & Surgical Clinic v. James, 555 P.2d 1320 (Alaska 1976)).

or's interpretation of a contract "is not open to judicial review, except on questions of arbitrability."[261] In finding the parties' dispute to be arbitrable, the court applied a pro-arbitration presumption that "if the arbitrator's determination of arbitrability is 'a reasonably possible one that can seriously be made in the context in which the contract was made,' then the court should affirm that finding."[262] The court rejected Ebasco's argument that the dispute was not arbitrable because Ebasco's breach and Ahtna's claim had arisen after termination of the parties' joint venture agreement, which contained the parties' agreement to arbitrate. Instead, the court found that because Ebasco's obligation to Ahtna arose during the term of the joint venture agreement, it did not matter that the breach of that obligation occurred after the joint venture agreement expired. The court concluded that "disputes over obligations arguably arising from an expired contract are arbitrable."[263]

In *Feichtinger v. Conant*,[264] the supreme court granted arbitrators absolute immunity from liability for damages arising out of their quasi-judicial actions.[265] An issue of first impression, the court held that "[a]rbitral immunity is the rule in virtually all jurisdictions, and we now adopt it."[266] Applying this doctrine, the court ruled that an arbitrator is immune from claims alleging that the arbitrator deprived a party of due process rights.[267]

The court also faced the arbitrator's appeal for seventy-five percent of his attorney's fees in defending the liability suit.[268] The court held that because this was the first case dealing with arbitral immunity, the superior court's award of only thirty percent of the arbitrator's attorney's fees was within its discretion.[269] In the future, however, similar suits could be considered frivolous and, as a result, would justify an award of actual fees.[270]

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261. *Id.* at 661 (quoting Alaska State Hous. Auth. v. Riley Pleas, *Inc.*, 586 P.2d 1244, 1247 (Alaska 1978)).

262. *Id.* at 662 (quoting University of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1137 (Alaska 1974)).

263. *Id.* at 664.

264. 893 P.2d 1266 (Alaska 1995).

265. *Id.* at 1267.

266. *Id.* (footnote omitted).

267. *Id.* at 1266-67.

268. *Id.* at 1268.

269. *Id.*

270. *Id.*

V. CONSTITUTIONAL LAW

In *Abruska v. State Department of Corrections*,[271] the Alaska Supreme Court held that the Alaska Department of Corrections infringes a prisoner's right to due process of law if it does not allow the prisoner to call certain witnesses to testify at a disciplinary hearing about evidence that is not "repetitious or irrelevant."[272] Plaintiff Abruska had been accused of indecent exposure by a corrections officer. At his disciplinary hearing, Abruska intended to call two other inmates to testify that the same officer had falsely accused them of similar conduct on previous occasions. The hearing officer denied Abruska's request to allow the inmates' testimony because the two inmates were not party to the incident. A disciplinary committee concluded that Abruska had committed the infraction and sanctioned him with one week of restriction to his living module.[273] The supreme court reversed, holding that insofar as the excluded testimony tended to show that the officer had a history of filing similar unfounded charges, the testimony was relevant to impeach the corrections officer's account of the incident.[274] Therefore, the testimony did not constitute "repetitious or irrelevant evidence," which Department regulations permit a disciplinary committee to exclude.[275] The court also found that the disciplinary committee failed to follow the procedural requirements of the Alaska Administrative Code,[276] that requires the committee to question an officer who writes a disciplinary report where an inmate requests that the officer appear at the hearing.[277] The court concluded that the committee's failure to question the corrections officer, together with its exclusion of the testimony of the other inmates, deprived Abruska of his due process rights under the Alaska Constitution.[278] It remanded the case to the committee for a new disciplinary hearing.

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271. 902 P.2d 319 (Alaska 1995).
272. *Id.* at 322.
273. *Id.* at 321.
274. *Id.* at 322.
275. *Id.* (citing ALASKA ADMIN. CODE tit. 22 § 05.430(c) (1991)).
276. ALASKA ADMIN. CODE tit. 22 § 05.420(b)(5)(A) (1991).
277. *Abruska*, 902 P.2d at 322.
278. *Id.*

In *Gyles v. State*,[279] the court of appeals applied the U.S. Supreme Court's rule in *Minnesota v. Murphy*,[280] which holds that a parolee "cannot validly invoke the constitutional privilege [against self-incrimination]. . . when there is 'no real or substantial hazard of incrimination.'"[281] As part of his parole, defendant Gyles was required to participate in sexual offender treatment, but he could not enter a program because he refused to take a polygraph test required for admittance. As a result of this refusal, the Alaska Parole Board determined that he had broken his parole. Gyles appealed, claiming that his refusal to submit to a polygraph test was an exercise of his privilege against self-incrimination.

Applying *Murphy*, the court of appeals held that Gyles could not invoke the Fifth Amendment to avoid discussing the crimes for which he had already been convicted, since he had "no remaining right of direct appeal" for those convictions. Therefore, any admission he made could not harm him.[282] However, this same conclusion did not hold for crimes for which he had not yet been convicted. Because the record contained evidence that Gyles might have refused the polygraph test to avoid discussing crimes for which he had not yet been convicted, the court held that the superior court had erred in dismissing Gyles's pleadings and remanded the case for further consideration.[283]

In *State v. Zerkel*,[284] the court of appeals rejected the argument that an administrative driver's license revocation and subsequent criminal prosecution for the same conduct does not violate the constitutional prohibition against double jeopardy.[285] In the case, each defendant had been arrested for driving under the influence of alcohol and had his driver's license revoked in an administrative proceeding conducted by the Department of Public Safety. Each defendant had also been subjected to criminal prosecution by either the state of Alaska or the municipality of Anchorage.[286] The defendants claimed that the revocation of

279. 901 P.2d 1143 (Alaska Ct. App. 1995).
280. 465 U.S. 420 (1984).
281. *Gyles*, 901 P.2d at 1148 (quoting State v. Gonzalez, 853 P.2d 526, 530 (Alaska 1993)).
282. *Id.* at 1149.
283. *Id.* at 1149-50.
284. 900 P.2d 744 (Alaska Ct. App. 1995).
285. *Id.* at 757.
286. *Id.* at 745.

their licenses constituted punishment and therefore that the subsequent criminal prosecutions against them violated the Double Jeopardy Clauses of the U.S. and Alaska Constitutions.[287]

The defendants relied primarily on *United States v. Halper*[288] in which the U.S. Supreme Court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment [for purposes of double jeopardy analysis]."[289] The defendants argued that, under *Halper*, any sanction that serves a purpose other than compensating the government for its monetary loss must be considered punitive, and not remedial.[290] However, the Alaska Court of Appeals noted that the standard used in *Halper* was meant to apply only to cases in which a defendant had been subjected to a monetary penalty, imposed "ostensibly to compensate the government for its loss."[291] Because no monetary sanction was involved in this case, that standard was inapplicable.[292]

The court then determined that license revocation statutes existed primarily to protect the public from unsafe operators, not to punish the operator for his wrongful actions,[293] and thus were basically remedial in nature, citing considerable authority in agreement with this view.[294]

In *Shepherd v. State Department of Fish and Game*,[295] the supreme court rejected a challenge to the constitutionality of Alaska Statutes section 16.05.255(d),[296] which requires the Alaska Board of Game to "provide that . . . the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents."[297] Plaintiff Shepherd claimed that the statute violated the Privileges and Immunities, Commerce and Equal Protection Clauses of the U.S. Constitution,

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287. *Id.* at 746; U.S. CONST. AMEND. V; ALASKA CONST. art. I, § 9.
288. 490 U.S. 435 (1989).
289. *Zerkel*, 900 P.2d at 747 (quoting *Halper*, 490 U.S. at 448).
290. *Id.* at 748.
291. *Id.*
292. *Id.* at 751.
293. *Id.* at 755.
294. *Id.* at 753-55.
295. 897 P.2d 33 (Alaska 1995).
296. ALASKA STAT. § 16.05.255(d) (1995).
297. *Shepherd*, 897 P.2d at 35 (quoting ALASKA STAT. § 16.05.255(d) (1995)).

as well as the Equal Protection and Equal Application Clauses of the Alaska Constitution.[298]

The supreme court rejected all of Shepherd's arguments. Addressing Shepherd's federal constitutional claims, the court dismissed his Privileges and Immunities claim because (1) Shepherd, as an in-state resident, lacked the standing to bring the claim and (2) because the U.S. Supreme Court had explicitly held that the Privileges and Immunities Clause did not protect the activity of recreational hunting.[299] It rejected Shepherd's Commerce Clause claim because the "burdens imposed on interstate commerce" were not "clearly excessive in relation to the putative local benefits."[300] The "purpose of conserving scarce wildlife resources for Alaska residents" is clearly both an important and a legitimate state interest, which outweighed the "de minimis" burden that the statute placed upon interstate commerce.[301]

The court then rejected Shepherd's claim that section 16.05.-255(d) violates the Equal Protection Clause, stating simply that "the fact that the moose populations . . . at issue are insufficient to tolerate unlimited recreational hunting by both resident and nonresident recreational hunters, taken together with the state's interest as trustee of its wildlife for the benefit of state residents, justifies the restriction."[302]

Turning to Shepherd's state constitutional claims, the court held that the regulations violated neither the Equal Rights and Opportunities Clause nor the Uniform Application Clause of the Alaska Constitution because both clauses apply only to those who are "similarly situated."[303] The court found that residents and nonresidents are not similarly situated in their use of Alaska game and fish.[304]

State v. Kenaitze Indian Tribe[305] involved a constitutional challenge to two parts of the Alaska subsistence hunting and fishing statute, Alaska Statutes section 16.05.258.[306] The supreme court

298. *Id.* at 36.
299. *Id.* at 41.
300. *Id.* at 42 (quoting Pike v. Bruce Church, 397 U.S. 137 (1970)).
301. *Id.* at 43.
302. *Id.*
303. *Id.* at 43-44.
304. *Id.* at 44.
305. 894 P.2d 632 (Alaska 1995).
306. ALASKA STAT. § 16.05.258 (1992).

held that the portion of the statute basing eligibility for a "Tier" subsistence permit[307] on proximity of the subsistence user's domicile to the fish or game violated the "equal access clauses"[308] of the Alaska Constitution but that the provision allowing the establishment of "nonsubsistence areas"[309] did not.[310]

The court determined that section 16.05.258(b)(4)(B)(ii), which requires the Boards of Fisheries and Game to consider the proximity of the user's domicile to the subsistence stock in question when issuing a Tier II permit, is unconstitutional under its decision in *McDowell v. State*.[311] In *McDowell*, the court held that it was a violation of the "equal access clauses" to allow only residents of rural areas to participate in subsistence fishing and hunting.[312] The *Kenaitze* court concluded that *McDowell* stood for the proposition that "residence-based criteria are not permissible" in determining who may and may not have access to fish and game.[313] Section 16.05.258(b)(4)(B)(ii) was impermissible because it "bars Alaska residents from participating in certain subsistence activities based on where they live."[314]

On the other hand, the court found that section 16.05.258(c), designating nonsubsistence areas, was not unconstitutional, since it did not prevent residents from engaging in subsistence activities based on where they lived.[315] "Though subsistence permits may not be issued [in nonsubsistence areas], subsistence activities can still take place. What is eliminated . . . is the statutory subsistence priority."[316]

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307. A Tier II permit grants a subsistence user a preferred status in harvesting fish or game when the fish or game population is insufficient to satisfy all subsistence uses. *Kenaitze*, 894 P.2d at 633.

308. "Sections 3, 15, and 17 of Article VIII of the Alaska constitution are collectively known as the equal access clauses." Stephen M. White, *Equal Access to Alaska's Fish and Wildlife*, 11 ALASKA L. REV. 277, 277 (1994).

309. A "nonsubsistence area" is "an area or community where dependence upon subsistence is not a principle characteristic of the economy, culture, and way of life." ALASKA STAT. § 16.05.258(c) (1992)). No subsistence priority exists in these areas. *Kenaitze*, 894 P.2d at 634.

310. *Kenaitze*, 894 P.2d at 642; ALASKA CONST. art. VIII, §§ 3, 15, 17.

311. *Kenaitze*, 894 P.2d at 638-39; McDowell v. State, 785 P.2d 1 (Alaska 1989).

312. *Kenaitze*, 894 P.2d at 638.

313. *Id.*

314. *Id.* at 642.

315. *Id.*

316. *Id.* at 640.

In *Pan-Alaska Construction, Inc. v. State Department of Administration, Division of General Services*,[317] the supreme court reaffirmed that the state satisfies the Equal Protection Clause under the Alaska Constitution[318] when the interest at stake is an economic one and the state's grounds for differentiating between groups bear a "fair and substantial" relation to a legitimate governmental objective.[319] Plaintiff Pan-Alaska sued the Division of Administrative Service ("DOA") to recover bid preparation costs spent in connection with a cancelled state construction project.[320] The DOA had already reimbursed three other construction companies that had spent money preparing bids for the same project and who had filed for the money within a six-month period as required by DOA regulations.[321] Pan-Alaska's claim, which had been filed four months after the time limitation had expired, was denied.[322] Pan-Alaska appealed this decision, claiming that in granting bid preparation costs to the other three companies but not to them, the DOA violated its right to equal protection under the Alaska Constitution.[323]

Because the reimbursement monies came from a fixed pool of funds, the court found that the DOA had a legitimate governmental interest in knowing in a timely manner how many companies were claiming a portion of these funds.[324] As Pan-Alaska, unlike the other construction companies, had missed the six-month deadline, the DOA had "reasonable ground for different treatment."[325]

In *O'Callaghan v. Coghill*,[326] the supreme court, in addressing the constitutionality of Alaska's "blanket primary" statute,[327] held that "a stipulation or consent judgment declaring a law unconstitu-

317. 892 P.2d 159 (Alaska 1995).
318. ALASKA CONST. art. I, §1.
319. *Pan-Alaska Construction*, 892 P.2d at 162.
320. *Id.* at 160.
321. *Id.*
322. *Id.* at 160-61.
323. *Id.* at 162.
324. *Id.*
325. *Id.* at 163.
326. 888 P.2d 1302 (Alaska 1995).
327. ALASKA STAT. § 15.25.060 (1988). The statute provides for a blanket primary in which all primary candidates are listed on a single ballot without regard to party affiliation. *O'Callaghan*, 888 P.2d at 1302.

tional is invalid"[328] and the blanket primary statute is not clearly unconstitutional under the U.S. Supreme Court's decision in *Tashjian v. Republican Party of Connecticut.*[329]

In 1992, the Republican Party of Alaska challenged the constitutionality of the blanket primary statute in federal court.[330] That case was settled after the Republican Party and the Lieutenant Governor stipulated that the Lieutenant Governor would adopt regulations permitting a ballot containing the names of Republican candidates only, which would then be available only to Republican, non-partisan and undeclared voters.[331] The supreme court determined that the state could not use this stipulation to defend the regulations from attack by O'Callaghan because the stipulation implied that the blanket primary statute was unconstitutional. The court determined that "[t]he question of the constitutionality of a statute is a judicial question, and it is not within the power of the parties to admit or stipulate as to their invalidity."[332]

The court also rejected the state's argument that it had the power to abrogate the blanket primary statute through the regulations because the statute was "clearly unconstitutional" under *Tashjian v. Republican Party of Connecticut.*[333] Although the court recognized that "the executive branch may abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision,"[334] it disagreed that the statute was clearly unconstitutional under *Tashjian. Tashjian* required the court to balance the state's interest in passing the statute with the burden the statute places on the plaintiff's rights. Alaska's statute was not clearly unconstitutional under *Tashjian* because Connecticut advanced a very different interest in its statute. Connecticut's interest was largely administrative, whereas Alaska's interests in passing its statute were "encouraging voter participation in primaries and enhancing voter choice."[335]

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328. *O'Callaghan,* at 1303.
329. 479 U.S. 208 (1986).
330. *O'Callaghan*, 888 P.2d at 1302.
331. *Id.* at 1303.
332. *Id.* at 1304 (quoting State v. Schnitger, 95 P. 698, 701 (Wyo. 1908)).
333. *Id.*; Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).
334. *O'Callaghan*, 888 P.2d at 1304.
335. *Id.* at 1305.

VI. CRIMINAL LAW

A. General

In *Baker v. State*,[336] the Alaska Court of Appeals held that a defendant could be convicted of robbery under a complicity theory, even though the state had argued to the jury that the defendant should be convicted as a principal only.[337] According to the state's evidence, defendant Baker ambushed and beat a pizza delivery man. Then he and two cohorts ran away with the delivery man's pizzas.[338] At trial, the jury was instructed that it could convict Baker as an accomplice to the acts of his cohorts, even if it found that he had not actually ambushed and beaten the delivery man.[339]

The court of appeals rejected Baker's argument that it was error to allow the jury to consider Baker's guilt under a complicity theory after the state had argued to the jury that it viewed Baker solely as a principal. Reviewing a long line of precedent, the court concluded that a defendant charged as a principal may be convicted as an accessory, and vice-versa.[340] The court further held that the revised Alaska criminal code had not abrogated this rule.[341]

The court distinguished Baker's case from *Michael v. State*,[342] in which the Alaska Supreme Court reversed a conviction for assaulting a child. There the defendant was convicted on the theory that, although he did not actually attack the child nor aid or abet his spouse's abuse of the child, he had failed to perform his parental duty to prevent his spouse's abuse. The supreme court determined the conviction to be invalid because it was not clear that the grand jury had considered such a theory.[343] The court of appeals in *Baker* distinguished *Michael* on the ground that, unlike the defendant in *Michael*, Baker was put on notice that he could be

336. 905 P.2d 479 (Alaska Ct. App. 1995).
337. *Id.* at 489.
338. *Id.* at 480-81.
339. *Id.* at 481-82.
340. *Id.* at 486.
341. *Id.* at 487.
342. 805 P.2d 371 (Alaska 1991).
343. *Id.* at 374.

convicted under an accomplice theory, given Alaska's non-distinction between principals and accessories.[344]

In *Ha v. State*,[345] the court of appeals read Alaska Statutes section 11.81.330(a),[346] which allows self-defense to be a justification for the use of "force" but does not expressly require that the threat of physical harm be "imminent," in conjunction with Alaska Statutes section 11.81.900(b)(23),[347] which defines "force" to include the threat of "imminent bodily impact,"[348] to hold that "a defendant claiming self-defense as a justification for the use of force must prove that he or she acted to avoid what he or she reasonably perceived to be a threat of imminent harm."[349] The court determined that although defendant Ha might have reasonably feared future harm from the victim in the case—because the victim had severely beaten and threatened to kill Ha, and had a history of violence and of carrying out his threats[350]—Ha's fear of future harm was insufficient to support a claim of self-defense.[351] Because the beating and threats had occurred twelve hours before Ha killed Buu, and Ha stalked Buu for over an hour before shooting him from behind, there was no evidence showing that Ha was in "imminent" danger.[352]

The court also held that a defendant's perception of imminence must be evaluated from the point of view of a reasonable person in the defendant's situation who is "clear and rational" and not mentally ill.[353] Therefore, Ha's extreme fear and possible brain injury from Buu's beating could not be used to establish a reasonable perception of imminent harm.[354]

In *Booth v. State*,[355] the court of appeals addressed two issues: (1) whether the state of Alaska has jurisdiction to prosecute crimes committed on the Annette Island Reserve[356] and (2)

344. *Baker*, 905 P.2d at 487-88.
345. 892 P.2d 184 (Alaska Ct. App. 1995).
346. ALASKA STAT. § 11.81.330(a) (1989).
347. *Id.* § 11.81.900(b)(23).
348. *Ha*, 892 P.2d at 191.
349. *Id.* at 194.
350. *Id.* at 186-87.
351. *Id.* at 194.
352. *Id.* at 188, 195-96.
353. *Id.* at 195-96.
354. *Id.*
355. 903 P.2d 1079 (Alaska Ct. App. 1995).
356. *Id.* at 1083.

whether the state is barred from prosecuting a defendant who has already had a judgment entered against him by the Metlakatla Indian Community's court.[357] Defendant Lester Booth had been fined $710 by the Metlakatla court for assault, battery and threat or intimidation.[358] Later, Booth pleaded no contest to a state charge of fourth-degree assault.[359]

The court first noted that, under 18 U.S.C. § 1162(a),[360] the state of Alaska has jurisdiction over offenses committed in "all Indian country within the state."[361] The statute provides an exception for the Metlakatla Community, however, giving the Metlakatlans the power to exercise jurisdiction within the Annette Island Reserve.[362] The court held that this exception does not give the Metlakatla Indians exclusive jurisdiction over crimes committed on their land.[363] Instead, the language and legislative history point to the conclusion that the state exercises a concurrent jurisdiction with the Metlakatla Indian Community.[364]

The court then held that the Federal Double Jeopardy Clause does not prohibit both the state and the Metlakatla court from prosecuting a defendant for the same crime, because the clause is not violated when separate sovereigns prosecute a defendant for the same criminal act.[365] Nevertheless, the court noted that Alaska Statutes section 12.20.010[366] bars the state from prosecuting a defendant who has already been convicted in the Metlakatla court.[367] The court determined that "the question of whether Booth was subjected to criminal prosecution (for double jeopardy purposes) hinges, not on the sentence Booth eventually received, but on Booth's potential risk of being sentenced to forced la-

357. *Id.* at 1085.
358. *Id.* at 1082.
359. *Id.*
360. 18 U.S.C. § 1162(a) (1994).
361. *Booth,* 903 P.2d at 1083.
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* at 1085.
366. Alaska Statutes section 12.20.010 provides that "when an act charged as a crime is within the jurisdiction of . . . a territory, as well as [within the jurisdiction] of this state, a conviction or acquittal in the former is a bar to the prosecution for it in this state." ALASKA STAT. § 12.20.010 (1995).
367. *Booth,* 903 P.2d at 1089.

bor."[368] Although the Metlakatla court only fined Booth, his crime was punishable under Metlakatla law by forced labor.[369] The court found forced labor to be a criminal penalty. Because Booth had already been subjected to a criminal prosecution, he was immune from further criminal prosecution.[370]

In *Dawson v. State*,[371] the court of appeals interpreted Alaska's "crack-house statute"[372] and held that the statutory requirement of "keeping or maintaining" a dwelling for the distribution of illegal drugs did not require the dwelling to be used solely or primarily for such distribution,[373] but did require that the offense be of a continuous nature.[374] Dawson had been convicted of five counts of maintaining a dwelling for "keeping or distributing" cocaine after selling the drug to an undercover officer on five occasions at his apartment.[375] On appeal, Dawson asserted that the crack-house statute applied only to dwellings used exclusively for keeping or distributing controlled substances and that he could not be convicted for five separate counts of the crime because the crack-house statute applied to continuing offenses.[376]

Relying on federal cases interpreting a similar federal statute,[377] the court of appeals rejected the defendant's first contention,[378] holding that the statute applied as long as keeping or distributing controlled substances was a "substantial purpose" of the dwelling.[379] However, the court reversed Dawson's convictions and remanded the case because it agreed with Dawson that the offense must be of a continuing nature and could not be an isolated incident.[380] In so holding, the court again relied on federal decisions, as well as the "plain meaning" of the terms "keep" and "maintain."[381] Nevertheless, the court stressed that

368. *Id.* at 1088.
369. *Id.*
370. *Id.* at 1088-89.
371. 894 P.2d 672 (Alaska Ct. App. 1995).
372. ALASKA STAT. § 11.71.040(a)(5) (1982).
373. *Dawson*, 894 P.2d at 675.
374. *Id.* at 676.
375. *Id.* at 674.
376. *Id.*
377. 21 U.S.C. § 856(a)(1).
378. *Dawson*, 894 P.2d at 675.
379. *Id.*
380. *Id.* at 676.
381. *Id.* at 675-76.

this reading of the statute did not preclude the state from proving a crime of a continuing nature based on evidence found on a single occasion.[382]

In another case involving Alaska's "crack-house" statute, *Wahrer v. State*,[383] the court of appeals held that in order for a defendant to be convicted for "knowingly keeping or maintaining any . . . building . . . which is used for keeping or distributing controlled substances,"[384] the state need only prove that the defendant "had the authority to control the premises if she chose to exercise it."[385] The requisite knowledge of the activity may be proved by "evidence that the defendant allowed the illegal drug activity to proceed by 'tacit consent or by not hindering [or by] taking no steps to prevent [it].'"[386] Therefore, the court sustained Wahrer's conviction, even though the jury instruction required nothing more for a guilty verdict than proof that the defendant had signed the lease on the apartment in which the drug sales were taking place.[387]

In *Municipality of Anchorage v. Sanders*,[388] the court of appeals held that Alaska Statutes section 12.45.120(5)(D) is not limited to "crimes against a person" but rather applies to all crimes resulting in any form of injury.[389] Section 12.45.120(5)(D) provides that criminal charges against a defendant may be dismissed if the victim of the act has a remedy by civil action, except where the crime has been committed against a person who previously lived in a spousal relationship with the defendant.[390] Under this

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382. *Id.* at 676.

383. 901 P.2d 442 (Alaska Ct. App. 1995).

384. ALASKA STAT. § 11.71.040(a)(5) (1982).

385. *Id.* at 444.

386. *Id.* (quoting Dawson v. State, 894 P.2d 672, 677 n.5 (Alaska Ct. App. 1995)).

387. *Id.* at 443.

388. 902 P.2d 347 (Alaska Ct. App. 1995).

389. *Id.* at 348.

390. The statute provides, in relevant part:

> If a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed . . .
> (5) against
> (A) a spouse or a former spouse of the defendant; [or] . . .
> (D) a person who is not a spouse or a former spouse of the defendant but who previously lived in a spousal relationship with the defendant.

provision, defendant Sanders moved to dismiss his prosecution on charges of destruction of property belonging to a woman with whom he had formerly lived, claiming that he had civilly compromised with the woman to have the charges dropped.[391] The trial court granted Sanders's motion, holding that the statutory exception does not refer to property crime but is limited to "crimes against the person."[392] The court of appeals reversed, ruling that the provision was not subject to such a limitation.[393] The court based its conclusion in part upon the legislative history of the statute. It noted that the original house bill specifically provided that crimes committed "by assault against" certain enumerated domestic victims could not be civilly compromised. However, when the bill was passed by the legislature the "by assault" restriction had been omitted.[394]

In *Crim v. Municipality of Anchorage*,[395] the court of appeals held that a driver arrested for driving while intoxicated ("DWI") need not be apprised of the results of a mandatory breath test in order to waive "knowingly and voluntarily" the right to an independent blood test guaranteed by Alaska Statutes section 28.35.033(e).[396] Having been arrested for DWI, defendant Crim submitted to a breath test.[397] The arresting officer informed Crim of his right to an independent blood test, but Crim did not ask to have one performed.[398]

The court of appeals declined to adopt a rule stating categorically that a DWI arrestee must know the results of his breath test in order to waive knowingly and voluntarily the right to an independent test.[399] The court stated that such a rule would be "artificial and uncalled for" since the typical DWI arrestee would appreciate the importance of the breath test result well before its result is disclosed.[400] Rather, the court held, the totality of the

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ALASKA STATUTES § 12.45.120 (1990).

391. *Sanders*, 902 P.2d at 348.
392. *Id.*
393. *Id.* at 350.
394. *Id.* at 349.
395. 903 P.2d 586 (Alaska Ct. App. 1995).
396. *Id.* at 587.
397. *Id.*
398. *Id.*
399. *Id.* at 588.
400. *Id.*

circumstances should govern the determination of the voluntariness of a waiver of the right to a blood test.[401] The court found that given the totality of the circumstances of Crim's refusal, he had understood clearly the purpose of the breath test and had voluntarily waived his right to an independent blood test.[402]

In *Peratrovich v. State*,[403] the court of appeals rejected a constitutional challenge to Alaska Statutes section 11.81.900-(b)(53)(B)(i),[404] which criminalizes sexual abuse of a minor, holding that the statute's exception for contact "that may reasonably be construed to be normal caretaker responsibilities for a child" was not unconstitutionally vague.[405] Defendant Peratrovich, convicted of sexual abuse of his thirteen-year-old granddaughter, argued that the term "normal" failed to specify a reasonably ascertainable standard of conduct.[406] In rejecting this contention, the court observed that under the statute, jurors are not asked to decide whether they personally feel that the defendant's act was part of "normal caretaker responsibilities" but rather whether the defendant's acts might be construed as such by a reasonable person.[407] Furthermore, the court noted that measuring a defendant's actions against what a reasonable person would deem proper is a common and acceptable legal standard.[408] In any event, the court stated that the Alaska Constitution does not require "meticulous specificity" in the wording of statutes and that "[i]t is difficult to perceive how the legislature might have been more precise" in drafting the statute in question.[409]

In *State v. Fremgen*,[410] the court of appeals held that a defendant is deprived of his right to due process of law under the Alaska Constitution if the defendant is convicted of sexually abusing a minor under the age of thirteen without being allowed to advance a claim of reasonable mistake of age as an affirmative

401. *Id.*
402. *Id.* at 588-89.
403. 903 P.2d 1071 (Alaska Ct. App. 1995).
404. ALASKA STAT. § 11.81.900(b)(53)(B)(i) (1995).
405. *Peratrovich*, 903 P.2d at 1074, 1078 (quoting ALASKA STAT. § 11.81.900-(b)(53)(B)(i) (1995)).
406. *Id.* at 1074.
407. *Id.* at 1075.
408. *Id.*
409. *Id.* at 1075-76.
410. 889 P.2d 1083 (Alaska Ct. App. 1995).

defense.[411] Alaska Statutes section 11.41.445(b) states that the affirmative defense of reasonable mistake of age is available unless the victim was under thirteen years of age.[412] Although the trial court ruled that the statute was unconstitutional as applied to the defendant, the court of appeals did not reach its decision on this basis.[413] Instead, the court based its conclusion on *State v. Guest*,[414] an Alaska Supreme Court decision that held "it would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent."[415] The court of appeals also emphasized that "[t]he Supreme Court of Alaska has consistently refused to allow a defendant to be convicted of a serious criminal offense based upon strict liability."[416]

In *Fox v. State*,[417] the court of appeals determined that a defendant's conviction does not violate section 1385 of the Posse Comitatus Act ("Act"), a federal statute that prohibits the use of the Army or Air Force to execute the laws, if the defendant's misconduct is uncovered in the course of a joint military-civilian investigation aimed at furthering a military or foreign affairs function.[418] The court affirmed the conviction of defendant Fox and his brother, who were apprehended pursuant to a drug investigation conducted jointly by the Army Criminal Investigation Division ("CID") and the Anchorage Police Department.[419] The court concluded that regulations promulgated under the Act, which contain an exception permitting joint military-civilian drug enforcement efforts when those efforts are undertaken "for the primary purpose of furthering a military or foreign affairs func-

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411. *Id.* at 1084.
412. ALASKA STAT. § 11.41.445(b) (1989).
413. *Fremgen*, 889 P.2d at 1084.
414. 583 P.2d 836 (Alaska 1978).
415. *Id.* at 838.
416. *Fremgen*, 889 P.2d at 1085.
417. 908 P.2d 1053 (Alaska Ct. App. 1995).
418. *Id.* at 1055. Section 1385 of the Posse Comitatus Act provides:
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (1988).
419. *Fox*, 908 P.2d at 1056.

tion,"[420] were not violated because the record supported a reasonable inference that CID was motivated by a legitimate military purpose.[421] The court pointed out that CID knew that drugs were being supplied to soldiers at Fort Richardson because a soldier, who acted as an informant in the investigation, had tested positive for drugs during a urinalysis. CID initiated its joint investigation with the police department in an effort to apprehend any such suppliers.[422]

The court also determined that CID was authorized to extend its investigation beyond the apartment, which the informant had identified as the location at which he had purchased drugs. The court arrived at this conclusion because CID had "reasonable grounds to believe" that Fox, from whom undercover agents purchased drugs in a separate apartment, was associated with the original targets of the investigation.[423]

In *R.I. v. State*,[424] the court of appeals held that superior courts lack the authority to convert a restitution order against a defendant into a civil judgment.[425] Having been adjudicated a juvenile delinquent, R.I. was ordered to make a restitution payment, which a superior court converted into a civil judgment upon revoking his probation.[426] The court of appeals reversed this aspect of the superior court's judgment, holding that no provision of the Alaska Statutes authorizes a court to issue a civil judgment in favor of a crime victim for the amount of damage inflicted by an adult or juvenile defendant.[427] The court noted that in the realm of criminal law, the supreme court had repeatedly held that legislation, not inherent judicial power, is the source of a court's sentencing authority.[428] In juvenile cases, the court stated, the supreme court has followed the same rule.[429]

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420. *Id.* at 1057 (quoting 32 C.F.R. § 213.10(a)(2)(i)), *removed by* 58 Fed. Reg. 25776 (April 23, 1993)). Although these regulations were removed from the Code of Federal Regulations, they remain in effect as Department of Defense Directive 5525.5. 58 Fed. Reg. 25776 (April 23, 1993).

421. *Id.* at 1058.

422. *Id.*

423. *Id.*

424. 894 P.2d 683 (Alaska Ct. App. 1995).

425. *Id.* at 684.

426. *Id.*

427. *Id.* at 685.

428. *Id.*

429. *Id.* at 685-86.

In *State v. Albert*,[430] the supreme court held that Alaska's recoupment system for recovering the costs of state-appointed counsel for criminal defendants does not violate a defendant's federal right to counsel, or federal or state equal protection rights. Alaska Statutes section 18.85.120(c)[431] allows a court, after a conviction, to enter a civil judgment for representation and court costs against a defendant who was represented by state-appointed counsel.[432] If the defendant can show financial hardship, the court can order the payment to be made in installments, or order reduction, remission or deferral of payment. Alaska Rule of Criminal Procedure 39 sets forth the procedures to be used to implement the recoupment system.[433]

The supreme court held that the statutory recoupment provisions do not violate the right to counsel as expressed in either the Federal Constitution or the Alaska Constitution because the statute protects recoupment debtors just as other civil debtors; it adjusts a recoupment debtor's obligation in light of financial hardship, and it allows a recoupment debtor to challenge the entry of recoupment judgment before judgment is entered.[434] Finally, the court rejected the claim that Rule 39 violates equal protection, concluding that the recoupment procedures are rationally related to the legitimate goal of fair and efficient collection of fees.[435]

In *Totemoff v. State*,[436] the supreme court addressed the legitimacy of subsistence hunter Mike Totemoff's conviction for violating Alaska Administrative Code title 5, section 92.080(7),[437] which prohibits hunting with the aid of artificial light.[438] Although Totemoff shot a deer on federal land with the aid of a spotlight while in a skiff in navigable waters, the court first held that the state had jurisdiction over Totemoff because state hunting regulations like section 92.080(7) could be applied to subsistence hunters on federal land.[439] The state would lack jurisdiction only

430. 899 P.2d 103 (Alaska 1995).
431. ALASKA STAT. § 18.85.120(c) (1994).
432. *Albert*, 899 P.2d at 104.
433. ALASKA R. CRIM. P. 39.
434. *Albert*, 899 P.2d at 112.
435. *Id.* at 115-16.
436. 905 P.2d 954 (Alaska 1995).
437. ALASKA ADMIN. CODE tit. 5, § 92.080(7) (July 1995).
438. *Totemoff*, 905 P.2d at 957.
439. *Id.* at 961.

if its enforcement was preempted by federal law.[440] However, the court found that (1) Alaska had not voluntarily ceded exclusive jurisdiction over hunting on federal lands or consented to exclusive federal control over this area and (2) the Alaska National Interest Lands Conservation Act ("ANILCA")[441] does not preempt the enforcement of state hunting laws against subsistence users on federal land.[442] The court reasoned that regulation of hunting is an area traditionally controlled by the states, and ANILCA did not evince a clear and manifest purpose to take over that area.[443] Moreover, ANILCA does not preempt section 92.080(7) because there is no conflict between the state regulation and ANILCA. In fact, the federal statute does not prevent the use of a spotlight as a means of subsistence hunting.[444]

Alternatively, the court ruled that the state had jurisdiction over Totemoff because it had exclusive jurisdiction over the navigable waters where Totemoff was located when he fired his rifle; those waters are not "public lands" within the ambit of ANILCA.[445] The court found that neither the federal government's navigational servitude nor its reserved water rights gave the federal government the right to regulate hunting and fishing in Alaska's navigable waters.[446]

After determining that jurisdiction was properly asserted, the court reversed the superior court's determination that Totemoff was prohibited from challenging the validity of the subsistence hunting regulation in a criminal proceeding.[447] The court held that this prohibition was based on a misinterpretation of *State v. Eluska*,[448] which stands for the proposition that a person may not hunt for subsistence purposes if there are no regulations authorizing the person to do so, not that a hunter is barred from defending against criminal prosecution on the ground that the challenged regulation is procedurally invalid.[449] However, the court rejected Totemoff's

440. *Id.* at 958.
441. 16 U.S.C. §§ 3101-3233 (1988).
442. *Totemoff*, 905 P.2d at 960.
443. *Id.* at 959.
444. *Id.* at 961.
445. *Id.* at 968.
446. *Id.*
447. *Id.* at 969.
448. 724 P.2d 514 (Alaska 1986); ALASKA STAT. § 16.05.259 (1992).
449. *Totemoff*, 905 P.2d at 969-71.

argument that *State v. Morry*[450] required the Board of Game to have held a special hearing on the regulation's impact on subsistence hunting, holding that the Board needed only to have complied with the Alaska Administrative Procedure Act[451] for the regulation to be valid.[452] The court remanded the case to afford Totemoff the opportunity to show that the Board failed to comply and held that a finding of noncompliance would result in the reversal of Totemoff's conviction.[453]

In *Champion v. State*,[454] the court of appeals held that a defendant's intent to sell stolen firearms to a pawn shop sufficiently establishes an intent "to deprive" a person of property for the purposes of convicting the defendant of theft under Alaska Statutes section 11.46.100(1).[455] Alaska Statutes section 11.46.990(8)(D) defines the term "deprive" as "selling, giving, pledging, or otherwise transferring any interest in the property of another."[456] Despite the defendant's obvious "pledging or otherwise transferring" of the property, he asserted that it had to be shown that he concurrently intended permanently to deprive the owner of the property as required in subsection (A), which defines the term "appropriate" in section 11.46.100(1).[457] The court concluded that despite the wording in the Alaska Criminal Code Revision's commentary to the contrary, an "intent to deprive" existed if Alaska Statutes section 11.46.990(8)(D) alone was satisfied.[458] A plain reading of the statute showed that the terms "appropriate" and "deprive" in section 11.46.100(1) are separated by the word "or," which meant that theft could be premised on proof that a person "deprive[d]" another person of property, without proving that the deprivation was so permanent as to amount to an "appropriat[ion]."[459]

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450. 836 P.2d 358 (Alaska 1992).

451. ALASKA STAT. §§ 44.62.180-.290 (1993).

452. *Totemoff*, 905 P.2d at 972.

453. *Id.* at 973.

454. 908 P.2d 454 (Alaska Ct. App. 1995).

455. *Id.* at 458. Section 11.46.100(1) provides that a person commits the crime of theft when, "with intent to deprive another of property or to appropriate property of another to oneself or a third person, the person obtains the property of another." ALASKA STAT. § 11.46.100(1) (1989).

456. ALASKA STAT. § 11.46.990(8) (1989).

457. *Champion*, 908 P.2d at 459.

458. *Id.* at 464.

459. *Id.*

B. Criminal Procedure

In *Noah v. State*,[460] the Alaska Court of Appeals reversed the conviction of a defendant because the trial court failed to obtain an on-the-record waiver of his right to testify prior to submitting the case to the jury. After the jury had begun its deliberations, the prosecution informed the trial court that the court was required to ask defendant Noah whether he wanted to testify. When Noah indicated that he did want to testify, the court called the jury back into the courtroom, informed them that the trial would continue and told them that they should disregard the previously made closing arguments. Noah's subsequent testimony was inconsistent with the closing argument his counsel had made. After another set of closing arguments, the jury returned a guilty verdict.[461]

The court of appeals found that the trial court clearly erred by failing to make an on-the-record inquiry regarding the defendant's desire to testify.[462] The court concluded that this error prejudiced Noah's right to fundamental fairness at trial because Noah's testimony, which was inconsistent with his counsel's previous summation, undermined both Noah's and his counsel's credibility.[463]

In *Lewis v. State*,[464] the court of appeals clarified the rule it adopted in *Garroutte v. State*[465] that "[w]hen a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a co-defendant, [this] evidence is not 'newly discovered,'"[466] and a motion for a new trial under Alaska Rule of Criminal Procedure 33 is properly denied.[467] The court held that the *Garroutte* rule applied not only to motions made under Rule 33, but also to motions made under Alaska Rule of Criminal Procedure 35.1(a)(4), which allows post-conviction relief where there exists "evidence of material facts, not previously presented and heard, [that] requires vacation of the conviction . . . in the

460. 887 P.2d 981 (Alaska Ct. App. 1995).
461. *Id.* at 982-83.
462. *Id.* at 983 (citing LaVigne v. State, 812 P.2d 217 (Alaska 1991)).
463. *Id.* at 983-84.
464. 901 P.2d 448 (Alaska Ct. App. 1995).
465. 683 P.2d 262 (Alaska Ct. App. 1984).
466. *Id.* at 268 (quoting United States v. Diggs, 649 F.2d 731, 740 (9th Cir. 1981)).
467. *Lewis*, 901 P.2d at 449; ALASKA R. CRIM. P. 33.

interest of justice."[468] The court determined that Rule 35.1(a)(4) "was not meant to enlarge the scope of previously existing post-conviction rights." Thus, construing Rule 35.1(a)(4) to allow new trials where Rule 33 does not would simply "elevate form over substance," because new trial motions based on identical fact patterns would be denied under Rule 33 and granted under Rule 35.1(a)(4).[469]

In *O'Connor v. Municipality of Anchorage*,[470] the court of appeals affirmed the defendant's conviction, ruling that a citizen arrest does not constitute government action for purposes of the Fourth Amendment where the police are informed of an arrest by citizens and simply dispatch officers to the scene without offering any encouragement or aid to the citizen-arresters.[471] Defendant O'Connor had been prevented from leaving a convenience store by two private citizens who called the police after observing him pull into the store's parking lot.[472] The court found that the police did not instigate the detention of O'Connor by the citizen arresters, and the police dispatcher gave no instructions to the citizens. Instead, the dispatcher merely notified the citizens that the police were coming.[473] The court also rejected O'Connor's argument that the citizen arrest was state action because the police knew of and acquiesced in it.[474] Because the police had reason to believe that a criminal offense had been committed in the private citizens' presence and, thus, that the citizens had authority to detain O'Connor, the police had no obligation to direct the citizens to release him.[475]

In *Rhames v. State*,[476] the court of appeals determined that a defendant's right to be brought to trial within 120 days, as required by Alaska Rule of Criminal Procedure 45,[477] is not

468. *Lewis*, 901 P.2d at 449 (quoting ALASKA R. CRIM. P. 35.1(a)(4)).
469. *Id.* at 449-50.
470. 907 P.2d 1377 (Alaska Ct. App. 1995).
471. *Id.* at 1379-80.
472. *Id.* at 1378.
473. *Id.* at 1380.
474. *Id.* at 1379.
475. *Id.* at 1380.
476. 907 P.2d 21 (Alaska Ct. App. 1995).
477. ALASKA R. CRIM. P. 45.

violated if continuances requested by defense counsel cause the trial to occur after the 120-day limit.[478]

In another case involving the 120-day requirement of Rule 45(c), *Drake v. State*,[479] the court of appeals ruled that Rule 45(c)[480] was tolled by the filing of a discovery motion that required court action.[481] Defendant Drake filed a motion to compel discovery one month following his arrest on October 28, 1992, but withdrew the motion five days later. On February 25, 1993, the prosecution and defense agreed to a trial date of March 1. The following day, however, Drake moved to dismiss the charges, arguing that the Rule 45 period had expired the day before. The trial court denied his motion.[482]

The court of appeals affirmed, holding that under Alaska Rule of Criminal Procedure 45(d)(1),[483] the time needed to resolve a motion to compel discovery qualifies as a period of time that must be excluded when computing the 120-day period.[484] The court distinguished Drake's case from *Miller v. State*,[485] which held that a defense request for discovery did not toll Rule 45. In *Miller*, the court noted, the defense's "request" for discovery did not ask for the court affirmatively to intervene in the discovery process.[486] In contrast, Drake had filed a "motion" asking the court to issue an order compelling the state to disclose certain information and

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478. *Rhames*, 907 P.2d at 25. The court also revisited two issues of statutory law. First, the court reaffirmed that pursuant to Alaska Statutes section 11.81.330(a)(3), a self-defense claim is not available to the initial aggressor in a confrontation. Second, the court noted that an inoperable firearm constitutes a "firearm" under Alaska Statutes section 11.81.900(b)(22).

479. 899 P.2d 1385 (Alaska Ct. App. 1995).

480. ALASKA R. CRIM. P. 45(c).

481. *Drake*, 899 P.2d at 1388.

482. *Id.* at 1385-87.

483. Alaska Rule of Criminal Procedure 45(d)(1) provides in relevant part:

> (d) Excluded periods. The following periods shall be excluded in computing the time for trial:
> (1) The period of delay resulting from other proceedings concerning the defendant, including but not limited to motions to dismiss or suppress, examinations and hearings on competency, the period during which the defendant is incompetent to stand trial, interlocutory appeals, and trial of other charges . . . .

ALASKA R. CRIM. P. 45(d)(1).

484. *Drake*, 899 P.2d at 1388.

485. 706 P.2d 336 (Alaska Ct. App. 1985).

486. *Drake*, 899 P.2d at 1387.

materials.[487] Because the defense's motion tolled the commencement of the 120-day period for five days, the period imposed by Rule 45 had not yet run on February 26.[488]

In *Hill v. State*,[489] the court of appeals held that the doctrine of *Griffin v. California*,[490] which forbids unfavorable comment relating to a defendant's exercise of the right to refrain from testifying at trial, does not forbid per se a prosecutor's statement that affirms the defendant's constitutional right to silence.[491] The court held that "a facially neutral reference to the constitutional right to silence becomes impermissible . . . only when it appears, in context, that the reference was manifestly intended as an adverse comment on the defendant's failure to testify or that the jury would naturally and necessarily understand it as such."[492] Applying this rule, the court of appeals did not find grounds for a mistrial when the prosecutor stated, "Obviously the defendant does not have to testify in this case. That is his constitutional right."[493]

In *Steffensen v. State*,[494] the court of appeals held that failure to notify a defendant of the execution of a *Glass* warrant[495] prejudices a defendant when the delayed notification "impairs the defendant's ability to challenge [his] intercepted conversation."[496] In reaching this conclusion, the court distinguished two types of prejudice to a suspect. The first type, illustrated by *United States v. Donovan*,[497] results when late notification of electronic monitoring "hampers the defendant's ability to file pre-trial suppression motions or gain pre-trial knowledge of the monitored conversations."[498] When this type of prejudice occurs, the court determined that evidence from the defendant's intercepted conversations

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487. *Id.* at 1388.
488. *Id.*
489. 902 P.2d 343 (Alaska Ct. App. 1995).
490. 380 U.S. 609 (1965).
491. 902 P.2d at 346.
492. *Id.*
493. *Id.*
494. 900 P.2d 735 (Alaska Ct. App. 1995).
495. Pursuant to State v. Glass, 583 P.2d 872 (Alaska 1978), *Glass* warrants permit authorities to record electronically a suspect's conversations without informing the suspect for several days. In *Steffensen*, the superior court authorized the state to wait 90 days before informing Steffensen. *Steffensen*, 900 P.2d at 737.
496. *Steffensen*, 900 P.2d at 743.
497. 429 U.S. 413 (1977).
498. *Steffensen*, 900 P.2d at 741.

should be suppressed, without the defendant showing anything more.[499]

In contrast, the second type of prejudice occurs when, as a result of the late notification, the defendant is delayed in finding out that he or she is under investigation.[500] This type of prejudice "is cognizable under the rubric of pre-accusation delay."[501] Thus, to have evidence suppressed that relates to this type of prejudice, "the defendant must establish both that he or she was actually prejudiced by the delay *and* that the government had no valid reason for its delay in filing the criminal charge against the defendant."[502]

The court concluded that the second type of harm existed because Steffensen claimed that, as a result of the delayed notification relating to the *Glass* warrants, he was not notified of the criminal charges brought against him in time to find persons to impeach the prosecution's witnesses.[503] Concluding that the trial court had not adequately considered the reasons for the state's delay in charging Steffensen, the supreme court reversed and remanded the case.

In *Haas v. State*,[504] the court of appeals determined when a person who has agreed to drive to a police station for questioning is "in custody" for the purposes of a *Miranda* warning.[505] The court applied the reasonable person test set forth in *Hunter v. State*,[506] under which a person will be considered to be "in custody" if a reasonable person would not feel free to leave or break off the questioning. At the beginning of the interview, the officer informed the defendant that he was not under arrest and was free to leave.[507] However, after the defendant implicated himself in the crime and asked whether he was still free to go, the police officer said he was not sure.[508] The defendant subsequently admitted to the crimes. The court found that the defendant had been "in custody" for the purposes of *Miranda* after it became

499. *Id.*
500. *Id.* at 743.
501. *Id.*
502. *Id.* at 741 (emphasis in original).
503. *Id.* at 738.
504. 897 P.2d 1333 (Alaska Ct. App. 1995).
505. *Id.* at 1334.
506. 590 P.2d 888 (Alaska 1979).
507. *Haas*, 897 P.2d at 1335.
508. *Id.*

unclear whether the defendant could leave, and all statements made after that point should have been suppressed.[509]

In *Johnson v. State*,[510] the court of appeals held that an *in camera* examination of a sexual assault victim should be conducted only "when necessary" to determine the admissibility of evidence reflecting on that victim's character.[511] Such an examination is necessary "only upon a threshold showing of good cause—that is, upon proof of a colorable ground to believe that character evidence favorable to the defense actually does exist and will be disclosed by the requested examination."[512]

In *Ryan v. State*,[513] the court of appeals decided whether a "residual" hearsay exception applied to statements made to the police by a deceased complaining witness, even though the statutes did not fall within the listed exceptions to the hearsay rule. The court's analysis focused on whether the statements had the "same guarantees of trustworthiness that characterize the other types of admissible hearsay."[514] The court noted that "the primary factor used by courts in evaluating the trustworthiness of hearsay is the potential . . . to withhold or alter the truth."[515] The court found that the statements at issue did not have the requisite trustworthiness, as the witness had motivation for making a false statement, in addition to having made contradictory statements to the police.[516]

In *Kiehl v. State*,[517] the court of appeals elucidated the rules in *Reekie v. Anchorage*,[518] *Anchorage v. Marrs*[519] and *Farrell v.*

509. *Id.*
510. 889 P.2d 1076 (Alaska App. 1995).
511. *Id.* at 1079 (quoting ALASKA R. EVID. 404(a) commentary at 454).
512. *Id.*
513. 899 P.2d 1371 (Alaska Ct. App. 1995).
514. *Id.* at 1379.
515. *Id.* at 1380.
516. *Id.* at 1379-80.
517. 901 P.2d 445 (Alaska Ct. App. 1995).
518. 803 P.2d 412 (Alaska Ct. App. 1990)(holding that right to confer with counsel was violated where officers stood by defendant during telephone conversation with attorney, and defendant was aware that the conversation was being recorded).
519. 694 P.2d 1163 (Alaska Ct. App. 1985)(holding that defendant's right to confer with counsel was not violated by the mere presence of officers during telephone conversation with attorney, even though defendant felt that he was unable to converse openly with his attorney).

State,[520] by holding that a defendant's right to hold a private conversation with an attorney is not violated merely because the arresting officer is in close physical proximity.[521] To violate that right, the police officer must "engage[] in additional intrusive measures that indicate to the defendant that the officer is intent on overhearing and reporting the defendant['s] conversations with [his] attorney[]."[522] In determining whether the officer "engaged in additional intrusive measures," the court's "primary consideration" was the confidentiality of attorney-client communications.[523] In this case, the court determined that the officer's physical proximity was not intrusive because the officer came and went throughout the conversation. That behavior, the court concluded, indicated the officer had little interest in overhearing the conversation.

The court also recognized that recording a defendant's conversation with his attorney could be sufficiently intrusive to violate the defendant's right. However, the court determined that, in this particular case, the officer's surreptitious recording of Kiehl's conversation was not intrusive because Kiehl remained oblivious to the recording. Hence, the recording had no "discernible impairment of Kiehl's consultation with counsel."[524]

In *Gilbert v. State*,[525] the court of appeals applied the rules stated in *McCurry v. State*[526] and *Lewis v. State*,[527] which govern when a prosecutor can comment on a defendant's failure to call a witness.[528] The Alaska Supreme Court noted in *McCurry* that "comment on a defendant's failure to call a witness is usually allowed only when the absent witness is peculiarly within the control of the defendant and when, under the defendant's version of events, the witness could reasonably be expected to provide testimony favorable to the defense."[529] In *Lewis*, the court of

520. 682 P.2d 1128 (Alaska Ct. App. 1984)(holding that right to confer with counsel was violated where officer stood next to defendant and took notes on the defendant's conversation with his attorney).

521. *Kiehl*, 901 P.2d at 447.

522. *Id.*

523. *Id.*

524. *Id.*

525. 891 P.2d 228 (Alaska Ct. App. 1995).

526. 538 P.2d 100 (Alaska 1975), *overruled on other grounds by* Howe v. State, 589 P.2d 421 (Alaska 1979).

527. 862 P.2d 181 (Alaska Ct. App. 1993).

528. *Gilbert*, 891 P.2d at 230.

529. *Id.* (citing *McCurry*, 538 P.2d at 104).

appeals noted that many courts have abandoned the requirement that the witness be peculiarly within the defendant's control.[530]

Applying these two rules to the present case, the court held that the prosecutor's comment on the defense's failure to call a witness was improper because there was no evidence on the record that the witness was available to the defendant.[531] Furthermore, there was no indication on the record that the witness would have been anything other than a neutral witness without knowledge helpful for clarification of any of the issues in dispute at trial.[532] Therefore, because the witness's testimony would not "naturally be expected to be favorable" to the defendant, the prosecution could satisfy neither the *McCurry* rule nor the *Lewis* rule, and the prosecutor's mention of the defendant's failure to call the witness was not legal.[533]

In *Rogers-Dwight v. State*,[534] the court of appeals refined the rule of *Ozhuwan v. State*[535] that "to justify conduct that would amount to [a Fourth Amendment] stop, an officer must be aware of at least some specific circumstances" supporting a reasonable suspicion of wrongdoing or a reasonable belief that the occupants of a vehicle need assistance.[536] In this case, defendant Rogers-Dwight pulled her car over to the side of the road when she noticed a police car with its overhead lights turned on. Rogers-Dwight had parked behind another car—a car which had been speeding and which the officer had intended to stop. When the officer approached Rogers-Dwight's car to inform her that she was not the object of his stop, he noticed that she appeared intoxicated and arrested her.[537] The defendant claimed that her arrest amounted to an illegal Fourth Amendment stop because the officer had no reasonable suspicion of wrongdoing.[538] The court of appeals sustained the defendant's conviction, holding that (1) it was reasonable for the officer to make contact with the defendant to advise her that she was free to go and (2) it was permissible for the

530. *Id.* (citing *Lewis*, 862 P.2d at 190).
531. *Id.* at 231.
532. *Id.*
533. *Id.*
534. 899 P.2d 1389 (Alaska Ct. App. 1995).
535. 786 P.2d 918 (Alaska Ct. App. 1990).
536. 899 P.2d at 1391 (quoting *Ozhuwan*, 786 P.2d at 922).
537. *Id.* at 1389-90.
538. *Id.* at 1390.

officer to approach and speak to the defendant to eliminate the chance that the defendant might be harmed if the officer's impending contact with the driver that had been speeding took a bad turn.[539]

In *Moore v. State*,[540] the court of appeals applied Alaska Rule of Criminal Procedure 25(d), which grants the right peremptorily to challenge a judge, and held that a single co-defendant could exercise the peremptory challenge without the consent of the other co-defendants.[541] When co-defendants, who as a group are permitted one peremptory challenge of a judge, could not agree on the use of the challenge, one defendant unilaterally challenged the judge.[542] The remaining defendants appealed, arguing that the challenging defendant should not have the power unilaterally to exercise the one peremptory challenge.[543] The co-defendants requested that the challenge be invalidated or alternatively that additional peremptory challenges be granted.[544]

The court of appeals reasoned that if the use of a peremptory challenge is necessary to ensure one defendant a fair trial, then justice is best served by allowing the challenge, even if the other co-defendants prefer the original judge.[545] In addition, absent a claim that the new judge would be unable to provide a fair trial for the remaining defendants, it is unnecessary to provide additional peremptory challenges to those defendants.[546]

In *Tan v. State*,[547] the court of appeals held that a litigant may not be subject to Alaska Rule of Criminal Procedure 25(d)(5)[548] when her counsel was told by a court official that, contrary to the language of the Rule, he could peremptorily challenge a superior court judge after having participated in a

539. *Id.* at 1392.
540. 895 P.2d 507 (Alaska Ct. App. 1995).
541. *Id.* at 509.
542. *Id.*
543. *Id.*
544. *Id.*
545. *Id.*
546. *Id.* at 512-13.
547. 900 P.2d 759 (Alaska Ct. App. 1995).
548. ALASKA R. CRIM. P. 25(d)(5). Rule 25(d)(5) prohibits a litigant from challenging a judge if the litigant, "knowing that the judge has been permanently assigned to the case, participates before the judge in . . . a [change-of-plea] hearing." *Tan*, 900 P.2d at 763.

change-of-plea hearing before the judge.[549] The court of appeals found that the factual claim made by Tan's attorney concerning his conversation with the court official had not been fully litigated.[550] The court held that if the attorney's assertion was true, Tan might not have waived her right to challenge Judge Hopwood by having appeared before him for the change-of-plea hearing.[551] Additionally, the court held that Tan may be entitled to relief under Alaska Rule of Criminal Procedure 53,[552] which provides that "[the Criminal Rules] may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice."[553] The court therefore remanded the case to the superior court for a hearing on the credibility and legal effect of the assertions in Tan's attorney's affidavit.[554]

In *Hugo v. State*,[555] the court of appeals refined the two-prong *Aguilar/Spinelli* test[556] for evaluating the adequacy of a search warrant application that is based, in some part, on hearsay. Under the *Aguilar/Spinelli* test, the government first "must establish that the hearsay declarant obtained his or her knowledge in a reliable manner (generally, through first-hand observation) and is not speculating or repeating gossip."[557] The government must then establish that the hearsay declarant is a credible person. The *Hugo* court concluded that the first prong of the test could be satisfied "by inference if an informant furnishes the sort of detail that generally could be obtained only through personal knowledge."[558] The second prong may be met by showing that the declarant is trustworthy or by showing that his or her information has been independently corroborated.[559]

549. *Tan*, 900 P.2d at 763.
550. *Id.*
551. *Id.*
552. ALASKA R. CRIM. P. 53.
553. *Tan*, 900 P.2d at 763 n.2.
554. *Id.* at 763.
555. 900 P.2d 1199 (Alaska Ct. App. 1995).
556. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).
557. *Hugo*, 900 P.2d at 1201.
558. *Id.*
559. *Id.* at 1201-02.

In another case involving the *Aguilar/Spinelli* test, *Mix v. State*,[560] the court of appeals held that an informant's tip "need not necessarily satisfy the . . . test in order to contribute to a finding that reasonable suspicion" of imminent public danger exists so that an investigative stop may be justified.[561] In response to an anonymous report that the defendant was driving while intoxicated ("DWI"), a police officer stopped a vehicle driven by Mix, who was subsequently arrested for DWI.[562] Arguing that there was no reasonable suspicion to support the stop, Mix appealed from a denial of his motion to suppress all evidence gathered pursuant to the stop.[563]

The court used the *Aguilar/Spinelli* test only as "a framework for evaluating the trustworthiness of [the] hearsay report[]."[564] Because the officer had no indication the anonymous caller was "speaking from personal knowledge" of the defendant's intoxication,[565] the court held that the stop was not supported by a reasonable suspicion of imminent public danger.[566]

C. Ineffective Assistance of Counsel

In *Tucker v. State*,[567] the Alaska Court of Appeals applied the two-prong standard of *Risher v. State*[568] for evaluating claims of ineffective assistance of trial counsel to claims of both ineffective trial counsel and ineffective appellate counsel.[569] Under *Risher*, a defendant must (1) show that counsel failed to "perform at least as well as a lawyer with ordinary training and skill in criminal law,"[570] such that counsel lacked "minimal competence,"[571] and (2) "create reasonable doubt as to whether counsel's lack of

560. 893 P.2d 1270 (Alaska Ct. App. 1995).
561. *Id.* at 1272 (citing Goodlaw v. State, 897 P.2d 589, 591 (Alaska Ct. App. 1993)).
562. *Id.* at 1271-72.
563. *Id.* at 1272.
564. *Id.*
565. *Id.*
566. *Id.* at 1273.
567. 892 P.2d 832 (Alaska Ct. App. 1995).
568. 523 P.2d 421 (Alaska 1974).
569. *Tucker*, 892 P.2d at 836.
570. *Id.* at 834 (quoting *Risher*, 523 P.2d at 424).
571. *Id.*

competency contributed to the conviction."[572] Applying this standard, the court found that Tucker's trial counsel was not ineffective in failing to move for suppression of evidence relating to clothing that was taken without a warrant because counsel reasonably thought that the introduction of this clothing would not be damaging to the case.[573] In addition, Tucker did not create a reasonable doubt as to whether suppression would have changed the jury's decision.[574] The court also found the trial counsel not to be ineffective in failing to seek exclusion of certain testimony based upon "dream-refreshed" memory because counsel used a sensible and potentially effective fact-based approach to challenge the testimony.[575] Finally, the court found that appellate counsel was not ineffective in failing to seek appellate review of a meritless claim because counsel had sound tactical reasons for doing so. Moreover, as the claim was meritless, Tucker failed to show prejudice.[576]

In another case involving a claim of ineffective assistance of counsel, *State v. Steffensen*,[577] the court of appeals held that, when a criminal defendant's post-conviction claim of ineffective assistance is based upon her attorney's failure to challenge the government's evidence, he must show that (1) such a proposed suppression motion would have been granted if it had been filed during trial and (2) there is at least a "reasonable possibility" that the outcome of the trial court proceedings would have been different had the evidence been suppressed.[578] Defendant Steffensen had pled no contest to a charge of cocaine possession. Following his plea, he filed a petition for post-conviction relief, alleging that he had received ineffective assistance of counsel because his attorney did not seek suppression of the evidence found on his person by attacking the legality of his arrest. The trial court determined that there was a reasonable possibility that a suppression motion would have been granted if it had been filed, and allowed Steffensen to withdraw his plea.[579]

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572. *Id.*
573. *Id.*
574. *Id.*
575. *Id.* at 834-36.
576. *Id.* at 836-37.
577. 902 P.2d 340 (Alaska Ct. App. 1995).
578. *Id.* at 342.
579. *Id.* at 341.

The court of appeals remanded the case to the lower court for two determinations. First, the lower court was directed to determine whether Steffensen's attorney had a valid tactical reason for not filing the suppression motion, which under *Tucker v. State*,[580] would not constitute ineffective assistance of counsel.[581] Second, the lower court was directed to determine whether the motion would have been granted.[582] Under *Risher v. State*,[583] a defendant must prove (1) that the proposed suppression motion would have been granted and (2) that there is at least a reasonable possibility that the outcome of the trial court proceedings would have been different had the evidence been suppressed.[584] The court concluded that suppression of the evidence would obviously have affected the outcome of the case.[585]

In *Broeckel v. State*,[586] the court of appeals held that, when a client loses the right to appeal due to ineffective assistance of counsel, the client need not show prejudice in order to have his or her right to appeal restored.[587] After being convicted of first degree sexual assault, Broeckel informed his counsel at trial that he had hired a new attorney to represent him on appeal. Later, Broeckel sent a letter to his trial counsel and indicated that he expected him to file the notice of appeal. The trial counsel neither filed the appeal nor informed Broeckel of his intention not to do so, and the time for appeal expired.[588]

The court found that the trial counsel's conduct had violated Alaska Rules of Appellate Procedure 209(B)(4) and 517 as well as DR 2-110(A)(2) of the Code of Professional Responsibility.[589] It described three reasons to support its decision that a defendant in Broeckel's position did not need to show prejudice to have his right to appeal reinstated. First, an attorney who fails to file a notice of appeal "deprives the client of the right to an appeal, not just to the

580. 892 P.2d 832 (Alaska Ct. App. 1995).
581. *Steffenson*, 902 P.2d at 343.
582. *Id.* at 342.
583. 523 P.2d 421 (Alaska 1974).
584. *Steffensen*, 902 P.2d at 342.
585. *Id.* at 343.
586. 900 P.2d 1205 (Alaska Ct. App. 1995).
587. *Id.* at 1208.
588. *Id.* at 1206-07.
589. *Id.* at 1208; ALASKA R. APPELLATE P. 209(B)(4), 517; ALASKA CODE OF PROF. RESPONSIBILITY DR 2-110(A)(2).

right to a successful appeal."[590] Second, to decide if the client was prejudiced by his or her attorney's failure to file an appeal, the court would have to rule on the substantive matters of the appeal. Finally, requiring the trial court to rule on these substantive matters would be giving it "the essentially circular task of reviewing the propriety of its own legal decisions."[591]

D. Sentencing

In *Cornwall v. State*,[592] the Alaska Court of Appeals held that a sentencing court was barred by constitutional provisions prohibiting double jeopardy from correcting its misstatement regarding the length of a defendant's sentence if there was no "objectively ascertainable mistake" suggesting the court's original intent to sentence the defendant to the modified term.[593] The court of appeals noted that the sentencing court did not clearly demonstrate its original intent to sentence the defendant to the modified term. The contemporaneous record revealed no "irreconcilable inconsistencies or obvious anomalies" precluding the court from sentencing the defendant to the original term.[594] Therefore, the court's original sentence could not be increased.[595]

In *Mack v. State*,[596] the court of appeals held that Alaska Statutes section 12.55.085(f)(1),[597] which prohibits a sentencing court from suspending the imposition of sentences for sexual offenders, applies not only to those convicted of a completed sexual offense but also to those convicted of attempting a sexual offense.[598] The court reasoned that, while the language did not specifically include attempted sexual crimes, "it would defy both common sense and logic to think that a legislature concerned over the repetitive and escalating nature of sexual offenders' conduct would think it fitting to bar a suspended imposition of sentence only for a completed offense, and not for an attempt."[599]

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590. *Broeckel*, 900 P.2d at 1208.
591. *Id.*
592. 902 P.2d 336 (Alaska Ct. App. 1995).
593. *Id.* at 339-40 (quoting *Shagloak v. State*, 582 P.2d 1034 (Alaska 1978)).
594. *Id.* at 339.
595. *Id.*
596. 900 P.2d 1202 (Alaska Ct. App. 1995)
597. ALASKA STAT. § 12.55.085(f)(1) (1994).
598. *Mack*, 900 P.2d at 1202.
599. *Id.* at 1204.

In *Miyasato v. State*,[600] the court of appeals refined the rule of *Roman v. State*[601] that conditions of probation "must be reasonably related to the rehabilitation of the offender and the protection of the public."[602] The court held that, to satisfy the *Roman* "reasonably related" test, "a condition of probation need not be directly related to the offense for which the defendant stands convicted."[603] Applying the refined rule, the court found that the trial court properly could require a defendant convicted of burglary to undergo sex offender therapy as a condition of his probation.[604] In finding that the sex offender therapy was "reasonably related" to the rehabilitation of defendant Miyasato, the court noted that he had been convicted of two sexual assault felonies before he had been convicted of burglary. Moreover, he had perpetrated all three offenses against female victims.[605] In light of this fact, the court agreed with the trial judge, who posited that the source of Miyasato's criminal activity may have been his "anger" toward women. Thus, sex offender therapy aimed at addressing Miyasato's aggression toward women was "reasonably related" to his rehabilitation and to "the protection of the public."[606]

In *State v. Sykes*,[607] the court of appeals disapproved a trial court's failure to impose sentences of incarceration upon two white collar criminal defendants. Having defrauded the state of Alaska of at least $335,000 pursuant to a false janitorial services contracting scheme, the defendants pled no contest to theft in the second degree, a class C felony.[608] The trial court imposed a sentence of three years of imprisonment on both defendants but suspended both sentences. The court also placed each defendant on five years probation and required each to make $268,282 in restitution, to pay a $25,000 fine and to perform 150 hours of community service.[609] The state appealed, arguing that the sentence was too lenient.[610]

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600. 892 P.2d 200 (Alaska Ct. App. 1995).
601. 570 P.2d 1235 (Alaska 1977).
602. *Id.* at 1240.
603. *Miyasato*, 892 P.2d at 201-02.
604. *Id.* at 202.
605. *Id.* at 200.
606. *Id.* at 202.
607. 891 P.2d 232 (Alaska Ct. App. 1995).
608. *Id.* at 232-33.
609. *Id.* at 233.
610. *Id.*

The court of appeals held that the trial court was required to consider that "the defendants committed a more serious crime than the one for which they were convicted."[611] According to the court, the defendants actually committed first degree theft, which criminalizes thefts of $25,000 or more.[612] The court reviewed several other Alaska cases that had approved lengthy sentences and disapproved lenient sanctions imposed for similar crimes.[613] Although the cited cases involved class B felonies, while the defendants in the instant cases had been convicted of class C felonies, the court concluded that "the magnitude of the thefts and the likely failure of full restitution militate against imposing a sentence which does not require incarceration."[614] The court emphasized that failure to impose some period of imprisonment "would send the message that white-collar criminals who commit major theft offenses are able to avoid incarceration."[615]

In *Espinoza v. State*,[616] the court of appeals applied the rule of *Austin v. State*,[617] which states that "normally a first offender should receive a more favorable sentence than the presumptive sentence for a second offender," in vacating a prison sentence imposed upon a defendant for a probation violation.[618] Defendant Espinoza had been sentenced to three years imprisonment with two and one-half years suspended. Due to a subsequent probation violation, Espinoza was required to serve in prison six months of the suspended portion of his sentence. Espinoza later violated his probation a second time, and at his disposition hearing requested that the court require him to serve only a part of the remaining portion of his suspended sentence. He reminded the court that imposing all of the remaining suspended incarceration would yield a total sentence of three years imprisonment, a year longer than the two-year presumptive term specified for a two-time class C felony offender. As he was a first-time class C felony offender, Espinoza argued that to require him to serve in prison his

611. *Id.* at 234.
612. *Id.* at 233.
613. *Id.* at 234.
614. *Id.* at 235.
615. *Id.*
616. 901 P.2d 450 (Alaska Ct. App. 1995).
617. 627 P.2d 657 (Alaska Ct. App. 1981).
618. *Espinoza*, 901 P.2d at 452 (quoting *Austin*, 627 P.2d at 657-58).

entire suspended sentence would violate the rule of *Austin v. State*.[619] The court expressed uncertainty as to whether the *Austin* rule applied in the context of sentencing for a probation violation, but alternatively found that Espinoza's conduct presented sufficient aggravating factors to make his case an "exceptional" one for purposes of the *Austin* rule. The court thus ordered Espinoza to serve the entire suspended portion of his sentence.[620]

The court of appeals, citing *Bland v. State*,[621] vacated the sentence.[622] *Bland* held that the *Austin* rule applies to probation violation sentencing but noted that, under *Wylie v. State*,[623] a first offender is entitled to advance notice of the aggravating factors upon which the sentencing court will rely before receiving an "exceptional sentence" under the *Austin* rule.[624] Because Espinoza had not received prior notice of, nor opportunity to contest, the aggravating factors upon which the lower court relied, the court of appeals vacated his sentence and remanded the case with instructions to provide Espinoza with advance notice of any aggravating factors alleged by the state or relied upon by the sentencing court.[625]

In *Journey v. State*,[626] the supreme court held that, according to Alaska Statutes section 12.55.085(e),[627] the court does not expunge a defendant's criminal record when it suspends the imposition of his sentence and "set[s] aside" the conviction upon the successful completion of probation.[628] The court clarified the confusion surrounding the meaning of "set aside," which defendants often confuse with expunction.[629] Defendant Journey had been led by the trial court to believe that, upon completion of probation, he would be able to tell others that he had never been convicted in this matter.[630] However, when Journey applied for jobs, his

619. *Id.* at 451-52.
620. *Id.* at 452.
621. 846 P.2d 815 (Alaska Ct. App. 1993).
622. *Espinoza*, 901 P.2d at 454.
623. 797 P.2d 651 (Alaska Ct. App. 1990).
624. *Bland*, 846 P.2d at 817-18.
625. *Espinoza*, 901 P.2d at 453-54.
626. 895 P.2d 955 (Alaska 1995).
627. ALASKA STAT. § 12.55.085(e) (1990).
628. *Journey*, 895 P.2d at 961 (quoting ALASKA STAT. § 12.55.085(e) (1990)).
629. *Id.* at 962.
630. *Id.* at 956.

conviction appeared on his records.[631] The court rejected Journey's assertion that his conviction should have been expunged because the statute could have clearly allowed for expunction if that had been the legislative intent.[632]

In *Mancini v. State*,[633] the court of appeals held that a conviction in another state may qualify as a prior conviction for purposes of Alaska's presumptive sentencing statute, even though the conviction would not have qualified as a prior conviction under the other state's presumptive sentencing law.[634] Defendant Mancini had been convicted of burglary in California, and as a youthful adult offender, he was sentenced to commitment to a youth detention facility.[635] Mancini argued that Alaska should follow California law, where his burglary would not be treated as a prior conviction for sentence enhancement purposes.[636]

The court of appeals noted that the issue was governed by Alaska Statutes section 12.55.145(a)(2),[637] which provides that "a conviction in this or another jurisdiction of an offense having elements similar to those of a felony defined as such under Alaska law at the time the offense was committed is considered a prior felony conviction."[638] The court held that Mancini's commitment to youth detention qualified as a "conviction in . . . another jurisdiction" because California clearly regards such a disposition as a conviction, even if it does not treat it as such for presumptive sentencing purposes.[639] Mancini did not dispute that the burglary involved "elements similar to those of a felony defined as such under Alaska law."[640]

In *Callan v. State*,[641] the court of appeals held that for purposes of calculating a prisoner's good time credit and parole release date, the prisoner's various consecutive sentences should be treated as one composite sentence.[642] The court applied this rule to

631. *Id.*
632. *Id.* at 958-59.
633. 904 P.2d 430 (Alaska Ct. App. 1995).
634. *Id.* at 431.
635. *Id.* at 432.
636. *Id.* at 431.
637. ALASKA STAT. § 12.55.145(a)(2) (1995).
638. *Mancini*, 904 P.2d at 432 (quoting ALASKA STAT. § 12.55.145(a)(2) (1995)).
639. *Id.*
640. *Id.*
641. 904 P.2d 856 (Alaska Ct. App. 1995).
642. *Id.* at 858.

defendant Callan, who had been convicted of burglary while serving one year of parole relating to a previous theft conviction.[643] The superior court revoked his parole, ordered him to serve the one-year period in prison and sentenced him to three years in prison for the burglary conviction.[644] In an application for post-conviction relief, Callan argued that, because Alaska law permitted a prisoner to accrue good time credit at the rate of one day for every two days of good behavior in prison, he should be deemed to have completed his one-year theft sentence at the end of eight months. He contended that after eight months he would immediately begin four months of mandatory parole for the theft sentence. Thus, Callan argued, he would begin serving his three-year burglary sentence while he simultaneously served the four months of parole.[645] However, the court agreed with the Alaska Department of Corrections that Callan should be treated as having one composite four-year sentence, in which instance he would be released from prison four months later than if he were treated as having two separate sentences.[646] The court noted that Alaska's statutes had been modeled upon former federal statutes, and that federal courts interpreting them had reached the same conclusion.[647]

In *Pusich v. State*,[648] the court of appeals held that a sentence of twenty-five years imprisonment with seven years suspended for manslaughter and first-degree assault in a vehicular homicide case was not excessive, even though it was longer than any prior sentence for vehicular homicide affirmed on appeal in Alaska.[649] The court concluded that the facts of the particular case supported the sentence because Pusich was not a youthful offender, her recklessness was egregious and she had a long history of driving offenses including drunk driving and alcohol abuse. In addition, she had a propensity to engage in reckless drunk driving despite warnings to the contrary, and the results of her conduct were extreme—killing three people and seriously injuring a fourth.[650]

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643. *Id.* at 857.
644. *Id.*
645. *Id.*
646. *Id.*
647. *Id.*
648. 907 P.2d 29 (Alaska Ct. App. 1995).
649. *Id.* at 39.
650. *Id.* at 39-40.

The court also upheld the trial judge's finding that the state had proven that Pusich's conduct implicated aggravating factor (c)(10), which covers conduct that is considered the worst within the definition of manslaughter, because the single manslaughter count accounted for all three deaths.[651]

E. Evidence

In *Jackson v. State*,[652] the court of appeals held that expert testimony is not required to prove the mental incapacity of a victim in order to convict a defendant of second-degree sexual assault.[653] Second degree sexual assault, according to Alaska Statutes section 11.41.420(a)(3)(A), includes sexual penetration "with a person who the offender knows is mentally incapable."[654] While Alaska courts had not previously ruled on the issue of expert testimony, the court decided that expert testimony was not required to show a victim lacked the ability to understand the nature and consequences of engaging in sexual activity because a jury could make this determination from circumstantial evidence.[655] The testimony of the victim and her mother sufficiently demonstrated that, although the victim had a basic understanding of the mechanics of sexual intercourse, she could not recognize the practical consequences of her actions.[656]

In *Lau v. State*,[657] the court of appeals held that the incriminating results of a breath test administered to an arrestee charged with driving while intoxicated ("DWI") must be suppressed because a corrections officer dissuaded the driver from taking an independent blood test.[658] After being arrested for DWI, defendant Lau was informed of his right to take an independent blood test. While in police custody, Lau was left alone with corrections officer James Wood, with whom Lau happened to be friends. Wood informed Lau that the blood tests yielded higher readings than the breath tests, and that the police could use the results of such tests against

651. *Id.* at 33; ALASKA STAT. 12.55.155(c)(10) (1995).
652. 890 P.2d 587 (Alaska Ct. App. 1995).
653. *Id.* at 589.
654. ALASKA STAT. § 11.41.420(a)(3)(A) (1989).
655. *Jackson*, 890 P.2d at 591-92.
656. *Id.* at 592.
657. 896 P.2d 825 (Alaska Ct. App. 1995).
658. *Id.* at 829.

him. On the basis of this advice, Lau chose not to take the blood test.[659]

Lau argued that, pursuant to *Ward v. State*,[660] the result of his breath test must be suppressed because the state interfered with his right to an independent test.[661] The court of appeals agreed, holding that the corrections officer's conduct, even if it had been motivated solely by friendship, must be attributed to the state.[662] The court noted that "Wood was an on-duty, uniformed corrections officer guarding Lau as part of his duties at the pre-trial facility."[663] It found that the only reason Wood was in a position to dissuade Lau from exercising his rights was because Wood was a government officer having custody of Lau.[664] Citing *Ward*, in which the Alaska Supreme Court had concluded that deterrence of police misconduct was a compelling rationale for excluding breath tests where the state interferes with the right to an independent test, the court of appeals held that suppression of the breath test was the proper remedy.[665]

In *Downie v. Superior Court*,[666] the court of appeals held that the attorney-client privilege did not protect a communication from an attorney to her client when the subject of the communication was a matter of public record.[667] Susan Downie, an assistant public defender, appealed from an order of the superior court holding her in contempt for refusing to testify as to whether she informed her client of the client's revised criminal trial date.[668]

Noting that the case law of other states uniformly held that the attorney-client privilege did not cover an attorney's act of conveying public information to a client,[669] the court of appeals refused to deem the trial date a confidential matter. Downie also argued that the rule of confidentiality enunciated in Alaska Rule of Professional Conduct 1.6(a) expands the attorney-client privilege

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659. *Id.* at 827.

660. 758 P.2d 87 (Alaska 1988) (holding that results of breath tests must be suppressed if the state interferes with the driver's right to an independent test).

661. *Lau*, 896 P.2d at 826-27.

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.* at 828-29.

666. 888 P.2d 1306 (Alaska Ct. App. 1995).

667. *Id.* at 1310.

668. *Id.* at 1308.

669. *Id.* at 1310.

codified in the Alaska Rules of Evidence.[670] Rejecting Downie's argument, the court relied on the commentary to Rule 1.6(a) to hold that an attorney's obligation to give testimony concerning a client is completely governed by the rules of evidence.[671] The court concluded that Rule 1.6(a) does not expand the attorney-client privilege because it requires an attorney to invoke the attorney-client privilege only when it is applicable.[672]

In *M.R.S. v. State*,[673] the supreme court determined the proper scope of the psychotherapist-patient privilege under Alaska Rule of Evidence 504(b) as it relates to court-ordered examinations.[674] The superior court admitted a court-ordered psychological examination from a prior juvenile proceeding into evidence during a hearing to determine whether the defendant should be tried as a juvenile or adult.[675] The court of appeals agreed that the examination was properly admitted, on the ground that communications made during court-ordered examinations are not intended to be confidential.[676]

The supreme court reversed and remanded, holding that court-ordered examinations are admissible only for the specific purpose for which the examination is ordered.[677] The court reasoned that Rule 504(d)(6) provides an exception that deems communications made during court-ordered examinations not to be confidential insofar as they relate to the purpose for which the examination was ordered. If the broad exception recognized by the court of appeals were the rule, the existing exception in 504(d)(6) would be superfluous.[678]

VII. ELECTION LAW

In *Dansereau v. Ulmer*,[679] the supreme court addressed challenges by ten voters to the November 8, 1994, gubernatorial

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670. *Id.* at 1308-09. Alaska Rule of Professional Conduct 1.6(a) directs an attorney "not [to] reveal information relating to representation of a client unless the client consents after consultation."

671. *Downie*, 888 P.2d at 1309.

672. *Id.*

673. 897 P.2d 63 (Alaska 1995).

674. *Id.* at 67; ALASKA R. EVID. 504(b).

675. *M.R.S.*, 897 P.2d at 64-65.

676. *Id.* at 65-66.

677. *Id.* at 67.

678. *Id.*

679. 903 P.2d 555 (Alaska 1995).

election in which Tony Knowles was elected Governor of Alaska.[680] The voters asserted that certain monetary incentive schemes used during the election to encourage individuals to vote violated state and federal election laws. The court rejected the general challenge to such schemes, ruling that they are permissible when there is no evidence that would permit a reasonable inference that the persons responsible for the assistance program had intended to induce voters to vote for a particular candidate.[681] Specifically, the court found that Alaska Statutes section 15.56.030-(a)(2),[682] which prohibits a person from paying another person to vote for a particular candidate or proposition, does not prohibit compensation for voting per se.[683] The court then upheld the summary judgment decision that a North Slope Borough voter assistance program, which reimbursed rural voters for gasoline used for transportation to the polls, did not violate election laws because there was no evidence that the program organizers attempted to sway voters' choices.[684] However, applying this same standard, the court concluded that a postcard mailed to voters may have violated state election law because the postcard offered entry in a $1,000 cash prize drawing to those who submitted a ballot stub and stated that the Alaska Federation of Natives overwhelmingly endorsed Tony Knowles for governor.[685] Therefore, the court found that the trial court erred in finding that as a matter of law the mailing did not violate section 15.56.030(a)(2).[686]

Also, the voters asserted that the state committed election misconduct in its operation of the Prudhoe Bay voting station, at which many voters had to wait up to two hours to vote.[687] The court declined to hold that an unreasonable wait at an absentee voting station, in itself, can be considered election misconduct in violation of Alaska Statutes section 15.20.540.[688] In declining, the court took note of evidence in the record attesting to the government's prodigious efforts to run the station efficiently.[689]

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680. *Id.* at 558.
681. *Id.* at 565-66.
682. ALASKA STAT. § 15.56.030(a)(2)(1988).
683. *Dansereau*, 903 P.2d at 560.
684. *Id.* at 566.
685. *Id.* at 567.
686. *Id.* at 571.
687. *Id.*
688. *Id.* at 572; ALASKA STAT. § 15.20.540 (1988).
689. *Dansereau*, 903 P.2d at 572.

VIII. EMPLOYMENT LAW

A. General

In *Nenana City School District v. Coghill*,[690] the Alaska Supreme Court elucidated the interrelation among three statutes: (1) Alaska Statutes section 14.20.160,[691] which provides that a teacher's tenure rights are lost when his or her employment in the school district is interrupted or terminated; (2) Alaska Statutes section 14.20.010,[692] which provides that no one can be employed in Alaska public schools without a valid teacher's certificate; and (3) Alaska Statutes section 14.20.170,[693] which provides that a teacher may be dismissed at any time only for certain causes, including "substantial noncompliance with the school laws of the state."[694]

Coghill was a tenured teacher, employed by the Nenana City School District ("NCSD"), whose teacher's certification lapsed for a two-month period.[695] NCSD determined that because it was illegal under Alaska Statutes section 14.20.170 for the school district to employ Coghill as a full-time teacher during the lapse in her certification, her maximum pay was that of a substitute teacher, and she must remit the overpaid amount.[696] NCSD also determined that Coghill had lost her tenure under Alaska Statutes section 14.20.160.[697] Coghill filed suit to regain tenure status and to be relieved from reimbursement to the school district. Noting that the certification "requirements which . . . provide apparent protection of the public, i.e., continuing education, background check, and notification of arrest, were not in issue," the court found that the two-month lapse in certification did not constitute "substantial noncompliance" under section 14.20.170.[698] Because Coghill was not in "substantial noncompliance," she could not be

690. 898 P.2d 929 (Alaska 1995).
691. ALASKA STAT. § 14.20.160 (1992).
692. *Id.* § 14.20.010.
693. *Id.* § 14.20.170.
694. *Coghill*, 898 P.2d at 932-33.
695. *Id.* at 930.
696. *Id.* at 930-31.
697. *Id.*
698. *Id.* at 934.

dismissed.[699] As a result, her employment could not be "interrupted or terminated" under section 14.20.160.[700] Thus, she did not lose her tenure under that statute.[701] Consequently, she was not overpaid during the lapse in her teaching certificate, and she did not need to remit that sum to the school district.[702]

In *North Slope Borough v. Barraza*,[703] the supreme court held that the Alaska Constitution required a public employee terminated without a pre-termination adversarial hearing to be paid back pay for the period after termination through the date of the post-termination curative hearing where the propriety of the employee's termination was finally decided.[704] Georgette Barazza, an employee of North Slope Borough ("NSB") was terminated, without a pre-termination adversarial hearing.[705] Four months after a curative post-termination hearing was held, the hearing officer issued an interim decision ruling that NSB had just cause to terminate Barazza, but that her due process rights were violated by NSB's failure to provide a pre-termination hearing. The hearing officer awarded Barazza back pay through the final date of the curative hearing but did not file findings of fact and conclusions of law for four months.[706] The interim decision stated that the decision would not be effective until such findings were filed.[707] Barazza challenged the hearing officer's ruling that back pay was not due through the date that findings of fact and conclusions of law were filed.[708] Because the propriety of Barazza's termination was not determined with adequate certainty until the interim decision, the court ruled she was entitled to back pay up until the time when the interim decision was issued, not when the detailed findings were filed.[709] The court also found that the four-month delay between the issuance of the interim decision and

699. *Id.* at 933.
700. *Id.*
701. *Id.*
702. *Id.* at 934.
703. 906 P.2d 1377 (Alaska 1995).
704. *Id.* at 1381.
705. *Id.* at 1379.
706. *Id.*
707. *Id.*
708. *Id.*
709. *Id.* at 1381.

the detailed findings did not constitute an independent due process violation.[710]

In *Public Safety Employees Ass'n, Local 92 v. State,*[711] the supreme court reaffirmed both *Public Employees' Local 71 v. State*[712] and *State v. Public Safety Employees Ass'n,*[713] holding that an arbitrator's decision mandating payment under the Public Employment Relations Act[714] ("PERA") was ineffective until funds were appropriated by the state legislature. A mandatory interest arbitration proceeding was initiated pursuant to PERA during collective bargaining negotiations between the state and the Public Safety Employees Association.[715] The arbitrator ordered the state to pay certain employees geographic differential increases commencing September 1, 1990. The state claimed it could not comply because PERA required that the legislature appropriate the funds necessary to pay the increase, and the legislature was not due to meet until after September 1, 1990. The state decided not to comply with the arbitrator's decision, and a later arbitration imposed monetary penalties for failure to pay.[716] The court held that because the legislature could elect not to fund an arbitration award, the arbitrator's decision under the PERA was ineffective until funds were appropriated.[717] Consequently, the court ruled that any penalties for failure to pay would not accrue until the legislature actually appropriated the funds.[718]

In *State v. Meyer,*[719] the supreme court held that an order of the Alaska State Commission for Human Rights closing a complainant's case is judicially reviewable.[720] Andrea Meyer filed a gender discrimination complaint with the Commission against her employer, the Alaska Department of Fish and Game.[721] Two years later, the Commission's executive director issued a closing order, finding that Meyer's claims were not supported by substan-

710. *Id.*
711. 895 P.2d 980 (Alaska 1995).
712. 775 P.2d 1062 (Alaska 1989).
713. 798 P.2d 1281 (Alaska 1990).
714. ALASKA STAT. §§ 23.40.070-.260 (1990).
715. *Public Safety Employees Ass'n*, 895 P.2d at 982.
716. *Id.* at 983.
717. *Id.* at 986.
718. *Id.* at 987.
719. 906 P.2d 1365 (Alaska 1995).
720. *Id.* at 1367.
721. *Id.*

tial evidence. Meyer appealed the closing order to the superior court, where the Department argued that such an order was not appealable.[722] The supreme court affirmed the superior court's ruling that the closing order was reviewable and remanded Meyer's claim for hearing before the Commission.[723] The court reasoned that while previous judicial interpretations of Alaska Statutes section 18.80.135,[724] which authorizes review of Commission orders, did not contemplate a case closing order, a presumption of reviewability must be applied.[725] Applying this presumption, the court ruled that a case closing order had the requisite finality to be reviewable.[726] The court further held that once a discrimination complainant establishes a prima facie case, a hearing is warranted[727]; the burden required to compel a hearing is less than the burden required to prevail on the merits.[728]

B. Workers' Compensation

In *Chiropractors for Justice v. State*,[729] the supreme court considered the constitutionality of a 1988 amendment to the Alaska Workers' Compensation Act and a regulation promulgated by the Alaska Workers' Compensation Board in accordance with the Act.[730] The amendment created new procedures for the payment of workers' compensation benefits for "continuing and multiple treatments of a similar nature" and required the Board to adopt new standards for frequency of treatment.[731] In response, the Board promulgated Alaska Administrative Code title 8, section 45.082,[732] which established the maximum number of compensable treatments under the Act, as well as the procedure for gaining Board approval for treatments in excess of that maximum.[733] In 1990, a group of chiropractors referring to themselves as "Chiropractors for Justice" filed suit against the state alleging that the

722. *Id.*
723. *Id.* at 1377.
724. ALASKA STAT. § 18.80.135 (1986).
725. *Meyer*, 906 P.2d at 1369-70.
726. *Id.* at 1370.
727. *Id.* at 1375.
728. *Id.* at 1376.
729. 895 P.2d 962 (Alaska 1995).
730. *Id.* at 965-66.
731. *Id.* (quoting ALASKA STAT. § 23.30.095(c) (1990)).
732. ALASKA ADMIN. CODE tit. 8, § 45.082 (April 1991).
733. *Chiropractors*, 895 P.2d at 965.

amendment and the corresponding regulation violated their equal protection, due process and privacy rights, as well as the Act's presumption of compensability.[734]

The supreme court disposed of the due process claim, noting that the statute and regulation furthered several legitimate state interests, including "curbing abuse by health providers and claimants" and "saving jobs by reducing workers' compensation premiums."[735] It also determined that the amendment and the regulation bore a reasonable relationship to those interests.[736]

The court then addressed the equal protection claim under its sliding scale of review. Because the laws being challenged regulated only the manner in which a physician may be compensated under the Act, the interest at issue was an economic one. Therefore, it was entitled only to the minimum level of judicial scrutiny. For the statute to be upheld, the state needed to show only that it was pursuing legitimate objectives.[737] The court accepted the state's contention that the frequency standards were enacted "to ensure the delivery of medical services at a reasonable cost to the employers."[738] The court also found that the provisions bore a fair and substantial relationship to this objective and, thus, satisfied the nexus requirement of the equal protection analysis.[739]

The court also rejected the plaintiff's argument that the amendment and regulation impermissibly violated its members' right to privacy. It noted that the privacy right is not absolute and that in this instance the chiropractor's privacy interests were outweighed by the state's "interest in preventing fraud and abuse in the worker's compensation system."[740] Finally, the court dismissed the contention that the amendment violated the presumption of compensability contained in the statute. It reasoned that the legislature was free to narrow this presumption if it chose to do so.[741]

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734. *Id.* at 965-66.
735. *Id.* at 966.
736. *Id.*
737. *Id.* at 969.
738. *Id.* at 971.
739. *Id.* at 972.
740. *Id.*
741. *Id.* at 973.

In *Williams v. State Department of Revenue*,[742] the supreme court rejected plaintiff Mary Ann Williams's argument that the Alaska Workers' Compensation Board unconstitutionally denied her claim for stress-related mental injury. She claimed that Alaska Statutes sections 23.30.120(c)[743] and 23.30.265(17)[744] were unconstitutional[745] because they deprived her of equal protection and substantive due process by treating workers with mental injuries differently from workers with physical injuries.[746] Additionally, she argued that 23.30.265(17) was unconstitutionally vague and ambiguous, violating her procedural due process right.[747]

The court rejected her substantive due process claim, holding that the legislature made a "rational policy decision" when it enacted the amendments because mental injuries differ from physical injuries in that they are more difficult to verify and "more susceptible to fraud and abuse."[748] The court also rejected her equal protection argument.[749] Using the sliding-scale test required by the Alaska Constitution's equal protection clause, the court held that workers' compensation benefits "are merely an economic interest, and therefore, are entitled only to minimum protection under this court's equal protection analysis."[750] Because the statute's distinction between mental injuries, which are hard to diagnose, and physical injuries, which are easier to diagnose, had a "fair and substantial relationship" to the Act's purpose of ensuring "quick, efficient and fair" benefits to injured workers, the court held that these amendments did not violate equal protection.[751] Finally, because the statute involved is not criminal, and

742. 895 P.2d 99 (Alaska 1995).

743. ALASKA STAT. § 23.30.120(c) (1990).

744. *Id.* § 23.30.265(17).

745. *Williams*, 895 P.2d at 99-100. Section 23.30.265(17) specifies that mental injury is not compensable unless "the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment, and . . . the work stress was the predominant cause of the mental injury." ALASKA STAT. § 23.30.265(17) (1990). Section 23.30.120(c) abandons the presumption of compensability for claims of stress-induced mental injury. *Id.* § 23.30.120(c).

746. *Williams*, 895 P.2d at 101.

747. *Id.*

748. *Id.* at 103.

749. *Id.*

750. *Id.* at 103-04 (footnote omitted).

751. *Id.* at 104 (quoting Gilmore v. Alaska Workers' Compensation Board, 882 P.2d 922, 927 (Alaska 1994)).

it "is not so conflicting and confused that it cannot be given meaning in the adjudication process,"[752] it did not violate procedural due process.[753]

In *Williams v. Mammoth of Alaska, Inc.*,[754] the supreme court applied Alaska Statutes section 23.30.055, the exclusive remedy provision of the Workers' Compensation Act ("Act"),[755] holding that a general partner in a limited partnership qualified as an "employer" within the meaning of the Act and was thus immune from tort liability arising from an employee's fatal on-the-job accident. The employee's estate contended that the general partner, B.C.S.C., Inc., was acting as a separate corporate entity, and was not entitled to immunity under section 23.30.055.[756] The court rejected this argument, ruling that partners were not legal entities separate from the partnership because the partners had equal rights in the management of the partnership's business.[757] The court reasoned that where the employer is a partnership, each partner is an employer of the partnership's employees. Consequently, each partner was entitled to immunity under section 23.30.055.[758]

In *Huf v. Arctic Alaska Drilling Co., Inc.*,[759] the supreme court refined the rule of *Williams v. Mammoth of Alaska*,[760] which provides that the employee of a partnership is also the employee of each partner for the purposes of the exclusive liability provision of the Workers' Compensation Act.[761] It held that an employee of the partnership is not the employee of a partner "where [that] partner acts negligently outside of and not in the course of the partnership business. Thus, where the partner is negligent outside the course of partnership business, it does not benefit from the exclusive liability provision and is subject to tort liability."[762] In this case, Arctic Alaska Drilling Co. ("AADCO") constructed an oil rig prior to forming a partnership with Pool

752. *Id.* at 105.
753. *Id.* at 105-06.
754. 890 P.2d 581 (Alaska 1995).
755. ALASKA STAT. § 23.30.055 (1990).
756. *Williams*, 890 P.2d at 583.
757. *Id.* at 584.
758. *Id.* at 585.
759. 890 P.2d 579 (Alaska 1995).
760. 890 P.2d 581 (Alaska 1995).
761. ALASKA STAT. § 23.30.055 (1994).
762. *Huf*, 890 P.2d at 580.

Alaska, Inc. After the partnership was formed, a partnership employee was injured due to AADCO's pre-partnership negligence in building the oil-rig. Since the negligence occurred "prior to the formation of and obviously not in the course of the business of the partnership," AADCO was not immune from a negligence suit by the partnership's employee.[763]

In another case involving the exclusive remedy provision, *Sauve v. Winfree*,[764] the Alaska Supreme Court held that the provision does not grant co-employee immunity to the officers of a corporation who are sued in their capacity as landlords.[765] Having suffered injuries in a fall down a staircase at her place of employment, plaintiff Sauve collected workers' compensation benefits. Notwithstanding the exclusive remedy provided by workers' compensation for work-related injuries, she also brought suit against two officers of the corporation for which she worked, alleging that they had breached their duty as landlords. The two officers owned the business's premises through a separate partnership, which they owned in its entirety.[766]

The superior court granted summary judgment in favor of the defendants, holding that the exclusive remedy provision[767] barred the suit because the defendants were the plaintiff's co-employees.[768] The supreme court reversed, finding that "policy concerns and the purpose of the legislation" dictated that immunity should not extend to persons solely because they happen to be co-employees.[769] Specifically, noted the court, the superior court's holding would encourage landowners to adopt corporate forms that would render them "'paper' co-employees" in order to avoid their common law duties.[770]

The supreme court also defined the scope of co-employee immunity under the statute, holding that such immunity should apply only where the conduct underlying the action arises "out of

763. *Id.* at 581.
764. 907 P.2d 7 (Alaska 1995).
765. *Id.* at 9.
766. *Id.* at 7.
767. The provision provides that "[t]he liability of an employer prescribed in [section] 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee." *Id.* at 9 (citing ALASKA STAT. §23.30.055 (1990)).
768. *Id.*
769. *Id.* at 9.
770. *Id.* at 10.

and in the course of employment."[771] In doing so, the court adopted the regular workers' compensation "course of employment" standard, rather than the vicarious liability "course of employment" standard. It stated that "'if the accidental injury or death is connected with any of the incidents of one's employment, then the injury or death would both arise out of and be in the course of such employment.'"[772]

The court reversed the superior court's grant of summary judgment and remanded the case for determination of whether Sauve's injuries occurred in the course of her employment.[773]

In *Sumner v. Eagle Nest Hotel*,[774] the supreme court concluded that Alaska Statutes sections 23.30.155(b)[775] and (e)[776] are applicable in determining the due date for lump-sum permanent partial impairment ("PPI") payments. The court recognized that section 23.30.155(b) and (e) do not specifically apply to PPI payments. However, after examining workers' compensation law as it existed prior to 1988, the court found an "historical basis for applying section [23.30.155] time periods" to PPI. Thus, the court noted that a lump-sum PPI payment was due within twenty-one days after an employer is notified that an employee has been classified as having a PPI.[777]

In *Gibeau v. Kollsman Instrument Co.*,[778] the supreme court held that a workers' compensation claimant's attorney was not entitled to a lump-sum fee based upon the present value of the claimant's future disability benefits. The Alaska workers' compensation attorney's fees statute[779] does not specify whether fees

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771. *Id.* at 11 (quoting Northern Corp. v. Saari, 409 P.2d 845, 846 (Alaska 1966)).

772. *Id.* (quoting *Northern*, 409 P.2d at 846.)

773. *Id.* at 14.

774. 894 P.2d 628 (Alaska 1995).

775. Alaska Statutes section 23.30.155(b) provides that the first installment of workers' compensation is due on the fourteenth day after the employer is notified of the employee's injury or death.

776. Alaska Statutes section 23.30.155(e) provides that a penalty will be assessed if a workers' compensation payment is not made within seven days after it becomes due.

777. *Sumner*, 894 P.2d at 631. The court also concluded that when an insurer contests a doctor's conclusion that an employee has a PPI, and the controversion does not delay payment, the controversion does not provide a basis for a penalty, even if it was made in bad faith. *Id.*

778. 896 P.2d 822 (Alaska 1995).

779. ALASKA STAT. § 23.30.145(a) (1990).

should be paid periodically or in a lump sum.[780] However, "fees based on a percentage of an award cannot be presently calculated where substantial uncertainties exist as to the value of the award."[781] The claimant was awarded permanent total disability benefits to be distributed in biweekly installments but only as long as the claimant lived and continued to be unable to work due to his disability.[782] The claimant's future benefits could also be reduced or eliminated if the claimant were to recover damages from a third-party tortfeasor.[783] The court held that because the total amount of compensation awarded to the claimant is unknown at the time of the award, the "percentage fees based on an award payable for an indefinite number of installments cannot be reduced to a lump sum."[784]

In *Osborne Construction Co. v. Jordan*,[785] the supreme court held that where an employee suffers a work-related injury and then suffers an aggravation unrelated to his employment, the employee's claim still receives the workers' compensation statutory presumption of compensability, unless the employer can present sufficient affirmative evidence to rule out the work-relatedness of the employee's injury.[786] The court rejected the employer's claim that the presumption of compensability was rebutted because the disability claim was filed after a non-work-related injury.[787] The court noted that "the fact that an employee has suffered a non-work-related injury does not, standing alone, rebut the presumption of compensability."[788]

IX. ENVIRONMENTAL LAW

In *State v. Arnariak*,[789] the Alaska Court of Appeals examined when a state regulation will "relate to" the taking of wildlife such that it will be preempted by the Marine Mammal Protection

780. *Gibeau*, 896 P.2d at 823.
781. *Id.*
782. *Id.*
783. *Id.*
784. *Id.*
785. 904 P.2d 386 (Alaska 1995).
786. *Id.* at 391-92.
787. *Id.* at 390.
788. *Id.* (citing *Alaska Pacific Assurance Co. v. Turner*, 611 P.2d 12, 14 (Alaska 1980)).
789. 893 P.2d 1273 (Alaska 1995).

Act ("MMPA").[790] The MMPA states that "no state may enforce, or attempt to enforce, any state law relating to the taking of any species . . . of marine mammal within the State unless the secretary has transferred authority for the conservation and management of that species . . . to the State."[791] The court held that the Alaska Administrative Code, title 5, section 92.066,[792] which restricts access to Round Island to those holding a state-issued permit, and section 92.066(2)(D),[793] which prohibits the discharge of firearms, the disturbance or harassment of wildlife, and the removal of wildlife or parts of wildlife from Round Island, were not merely land use regulations, but were sufficiently "related to" the taking of wildlife to be preempted by a broad reading of the MMPA's preemption language.[794] Thus, the court of appeals upheld the trial court's decision to dismiss the prosecution of two persons charged under the Alaska regulations.[795]

In *Tulkisarmute Native Community Council v. Heinze*,[796] the supreme court reviewed a decision of the Department of Natural Resources to extend permits for the appropriation of water in the Tuluksk River and held that the regulatory standard in title 11, section 93.120(f) of the Alaska Administrative Code,[797] which requires an applicant for permit extension to demonstrate "diligent effort toward completing the appropriation," satisfies the more general statutory standard in Alaska Statutes section 46.15.10,[798] which grants an extension for "good cause shown."[799] The court reviewed the Department's decision under the "arbitrary and capricious or abuse of discretion standard,"[800] finding the decision arbitrary because the Department's rationale for extending the permit was "not related to the diligent effort criterion contained in

790. 16 U.S.C. §§ 1361-1421(h) (1994).
791. *Id.* at § 1379(a).
792. ALASKA ADMIN. CODE tit. 5, § 92.066 (July 1995 & Supp. Jan. 1996).
793. *Id.* § 92.066(2)(D).
794. *Arnariak*, 893 P.2d at 1277.
795. *Id.*
796. 898 P.2d 935 (Alaska 1995).
797. ALASKA ADMIN. CODE tit. 11, § 93.120(f) (Jan. 1996).
798. ALASKA STAT. § 46.15.10 (1995).
799. 898 P.2d at 943. The court also reviewed several factual determinations by the Department under the substantial evidence test. *Id.*
800. *Id.* at 940 (citing Olson v. State Dep't of Natural Resources, 799 P.2d 289, 293 (Alaska 1990)).

[section] 93.120(f)."[801] To meet the "diligent effort" requirement, the court determined that the Department should have required the holder of the permits "to describe the work which had been done to perfect the appropriation, show how the water had been beneficially used, or, at a minimum, explain why no use had yet been made, and state precisely why additional time was needed."[802] The supreme court also suggested that the permit holder might have satisfied the "diligent effort" requirement for the entire water appropriation project (covering a web of several streams) by demonstrating diligent efforts on a few streams, rather than each individual stream.[803] However, the court found that the permit holder had not shown diligence on any river; thus, it did not need to determine "on how many individual streams a permittee must demonstrate diligent effort to demonstrate diligence on a project."[804]

X. FAMILY LAW

A. General

In *Compton v. Compton*,[805] the Alaska Supreme Court affirmed the trial court's ruling that despite the provisions of a prenuptial agreement, the parties' actions during marriage could be evidence of their intent to convert separate property into marital property.[806] During the Comptons' marriage, William Compton co-mingled his separate premarital property with funds in a marital bank account[807] and spent some of his separate property in remodeling Gail Compton's house, which was the marital home.[808] Although William testified that he never gave any indication to Gail that the premarital property was to remain separate property,[809] he argued that the premarital agreement entitled him to reimbursement because it provided that "each party will keep, as that party's sole and separate property, all of that

801. *Id.* at 946.
802. *Id.* at 943.
803. *Id.* at 945-46.
804. *Id.* at 946.
805. 902 P.2d 805 (Alaska 1995).
806. *Id.* at 810.
807. *Id.* at 807.
808. *Id.* at 811.
809. *Id.* at 810-11.

party's premarital property."[810] The supreme court rejected this argument, determining that the prenuptial agreement did not preclude conversion of separate property into marital property.[811] Therefore, the disputed property had been converted and William was not entitled to reimbursement.[812]

In *Rodriguez v. Rodriguez*,[813] the supreme court held that marital property included property acquired during a period of separation if that separation did not lead to divorce.[814] Earlier, the court had held, in *Schanck v. Schanck*[815] that marital property did not include property acquired during a period of separation that led to the final divorce if the spouse used money earned during the separation to purchase the property.[816] Rolando Rodriguez relied on *Schanck* to argue that a house he purchased while he and Julieta Rodriguez were separated was not part of the marital property.[817] The court held that this interpretation was incorrect since Rolando and Julieta had "reconciled after their informal separation, without ever filing for divorce, and [had] lived together as husband and wife" in the house for three years after their separation.[818]

The court also held that marital property should be valued at the time of trial, not at the time of the final separation.[819] Rolando Rodriguez argued that the home he had purchased should be valued at the time of their final separation instead of the date of the trial.[820] The court rejected this argument,[821] citing *Ogard v. Ogard*[822] for the proposition that property should be valued at the date of separation only when the sole efforts of one spouse resulted in the increase in the value of the property.[823] The court found that rising property values do not constitute the sole efforts

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810. *Id.* at 809 n.3.
811. *Id.* at 811.
812. *Id.*
813. 908 P.2d 1007 (Alaska 1995).
814. *Id.* at 1012-13.
815. 717 P.2d 1 (Alaska 1986).
816. *Rodriguez*, 908 P.2d at 1012.
817. *Id.*
818. *Id.*
819. *Id.* at 1012-13.
820. *Id.* at 1012.
821. *Id.*
822. 808 P.2d 815, 819-20 (Alaska 1991).
823. *Rodriguez*, 908 P.2d at 1012.

of one spouse even if that spouse were responsible for the mortgage payments.[824]

In *Davila v. Davila*,[825] the supreme court held that the trial court erred in awarding reorientation alimony for a period longer than one year.[826] The supreme court concluded that reorientation alimony should be awarded in excess of one year only in cases where exceptional circumstances warrant a longer duration, and no facts on the record reflected such circumstances.[827] The court clarified the rule that reorientation alimony should be awarded only when the marital property cannot be easily divided to provide for both parties and should only last until the property can be divided or until a spouse finds a job that fits his or her skills.[828]

In *Saltz v. Saltz*,[829] the supreme court held that although Alaska Rule of Civil Procedure 82(b) does not apply to divorce cases in general, it does apply to actions to reduce a spousal support obligation to judgment. Therefore, in such an action, a party may recover attorney fees.[830]

In *Wainwright v. Wainwright*,[831] the supreme court held that, in a divorce proceeding, a spouse's nonvested pension may be divided for immediate allocation between the parties if the employee-spouse agrees to assume the risk that the pension might not vest.[832] This holding was in direct contrast to the court's decision in *Laing v. Laing*,[833] a case in which the court decided to retain jurisdiction and postpone the division of a pension until it had vested.[834] In *Laing*, the supreme court recognized that if a pension were reduced to its present value and the non-employee spouse were to receive a lump-sum payment, the employee spouse would unfairly bear the risk that the pension would not vest. The *Wainwright* court distinguished *Laing* by noting that this unfair risk burden was alleviated because the employee spouse was willing to assume the risk of nonvesting. Therefore, the general rule that

824. *Id.* at 1012-13.
825. 908 P.2d 1025 (Alaska 1995).
826. *Id.* at 1027.
827. *Id.*
828. *Id.* at 1026-27.
829. 903 P.2d 1070 (Alaska 1995).
830. *Id.* at 1071; ALASKA R. CIV. P. 82(b).
831. 888 P.2d 762 (Alaska 1995).
832. *Id.* at 765.
833. 741 P.2d 649 (Alaska 1987).
834. *Id.* at 658.

financial matters should be settled at the conclusion of a divorce trial was controlling.[835]

K.E. v. J.W.[836] involved a mother, K.E., who claimed that her ex-husband, J.W., should be equitably estopped from denying paternity to L.E., K.E.'s daughter. L.E. was conceived through natural insemination with the help of a surrogate father. At the time of the conception, K.E. and J.W. were dating, but J.W. could not father a child as a result of a vasectomy. Soon after K.E. became pregnant, K.E. and J.W. were married. After filing for divorce, K.E. filed this action to create a child support obligation for J.W.[837]

The supreme court noted that in order for an equitable estoppel claim to be successful, the plaintiff must show "(1) representation of a position by conduct or word, (2) reasonable reliance thereon by another party, and (3) resulting prejudice."[838] To establish prejudice, the plaintiff must show that "(1) the child may be deprived of the mother's potential action to hold the natural father responsible for the support of the child, (2) the child may suffer serious and lasting emotional injury from the denial of paternity or (3) the child may suffer a social injury from the removal of legitimacy."[839] The court concluded that K.E. could not satisfy any of these requirements and dismissed the action because K.E. could still bring a paternity action against L.E.'s natural father. It reasoned that because (1) J.W. had only spent between 90 and 180 days with L.E. after she was born and (2) J.W. had never claimed to be her legitimate father, "the paternal relationship [between them] could not have been truly established," and, thus, L.E. never had any status of legitimacy to lose.[840]

B. Child Custody

In *Howlett v. Howlett*,[841] the Alaska Supreme Court held that in a custody suit the best interests of a child should take precedence over the failure of a party to comply with a procedural rule.

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835. *Wainwright*, 888 P.2d at 765-66.
836. 899 P.2d 133 (Alaska 1995).
837. *Id.* at 134.
838. *Id.* (citing *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 102 (Alaska 1978)).
839. *Id.* at 135.
840. *Id.*
841. 890 P.2d 1125 (Alaska 1995).

Viveca Stone (formerly Howlett) was originally granted custody of her daughter Hilary after her divorce from Steven Howlett. Steven later filed a motion requesting that he be given custody of his daughter. Viveca's late response constituted a failure to comply with the ten-day time limit established by Alaska Rules of Civil Procedure 77(c)(1) and (2).[842] This failure prompted the superior court to grant custody of Hilary to Steven.[843]

The supreme court reversed and remanded, holding that "[f]ailure to follow Rule 77's specific requirements does not relieve the superior court of its duty to exercise its independent judgment to determine if Steven's motion to modify child custody support should be granted."[844] The superior court should have made fact findings and legal conclusions to determine whether a change in circumstances had occurred that would warrant a custody change that was in the child's best interest.[845]

In *Rogers v. Rogers*,[846] the supreme court reversed the superior court's decision to decline jurisdiction over a child custody proceeding. The court held that under the Uniform Child Custody Jurisdiction Act,[847] a court has jurisdiction to make a child custody determination if "the state in which the court sits is the child's home state, or had been the child's home state within six months before commencement of the proceeding . . . and a parent . . . continues to live in [the] state."[848] Further, the court held that the superior court abused its discretion in declining to exercise jurisdiction because it was in the child's best interest to have the custody proceedings take place in Alaska.[849]

In *Strother v. State*,[850] the court of appeals concluded that where "two parents . . . retain equal right to physical custody of a child, one parent may commit the crime of custodial interference by keeping and concealing a child from the other parent."[851] Timothy Strother appealed a conviction for first-degree custodial interference, arising from his actions of removing his daughter from

842. ALASKA R. CIV. P. 77.
843. *Howlett*, 890 P.2d at 1126.
844. *Id.* at 1127.
845. *Id.*
846. 907 P.2d 469 (Alaska 1995).
847. ALASKA STAT. § 25.30.010 (1994).
848. *Rogers*, 907 P.2d at 471.
849. *Id.* at 472.
850. 891 P.2d 214 (Alaska Ct. App. 1995).
851. *Id.* at 220.

Alaska and hiding the child from her mother.[852] Strother argued that, absent a court decree defining the legal rights of the parents, no parent can violate the statute prohibiting custodial interference.[853] The court observed that, because the purpose of the custodial interference statute was to protect custodians from deprivation of their custody rights, the legal status of the defendant was not the focus of the crime.[854] The court ultimately concluded that "when a child is entrusted to joint custodians, neither custodian may take exclusive physical custody of the child in a manner that defeats the rights of the other joint custodian."[855] Applying this rule, the court found that, although Strother's removal of the child was within his authority, "keeping" the child hidden from her mother was unlawful and constituted the actus reus of custodial interference.[856]

C. Child Support

In *Miller v. Miller*,[857] the Alaska Supreme Court held that a father is entitled to have credited against his child support obligations "children's insurance benefits" paid to his daughter pursuant to his social security benefits.[858] The court noted that "'the overwhelming majority of states that have considered this issue allow a credit for social security benefits paid to dependent children.'"[859] Moreover, because the purpose of Alaska Rule of Civil Procedure 90.3[860] is to ensure that the needs of the child are met,[861] the court determined that "'the actual *source* of the payments is of no concern to the party having custody as long as they are in fact made.'"[862] The court also held that because the father would be credited for the social security benefits received by his daughter, the benefits must be included as income in calculating

852. *Id.* at 216-17.
853. *Id.* at 222.
854. *Strother*, 891 P.2d at 220-21.
855. *Id.* at 223.
856. *Id.* at 224.
857. 890 P.2d 574 (Alaska 1995).
858. *Id.* at 576.
859. *Id.* (quoting Pontbriand v. Pontbriand, 622 A.2d 482 (R.I. 1993)).
860. ALASKA R. CIV. P. 90.3 (setting out procedures for determining child support obligations).
861. *Id.* commentary I(B).
862. *Miller*, 890 P.2d at 577 (quoting Davis v. Davis, 449 A.2d 947 (Vt. 1982)).

the father's child support obligation in order to avoid granting him a windfall.[863]

In *Sanders v. Sanders*,[864] the supreme court held that the formula under Alaska Rule of Civil Procedure 90.3[865] for calculating child support applies to a determination of support under Alaska Statutes section 25.24.140(a)(3),[866] which provides for support, under special circumstances, of children who have reached their eighteenth birthday.[867] The court also held that "an adult disabled child's 'ability to provide for herself out of her own means must always be considered' when determining whether a parent has a continuing duty of support for that child."[868]

In *State v. Allsop*,[869] the supreme court held that the Child Support Enforcement Division ("CSED") was a proper defendant in an action by a man to disestablish his paternity of a child.[870] CSED was proper because (1) CSED had pursued him for child support,[871] (2) he had a statutorily created entitlement to seek relief from CSED's actions in court,[872] (3) the basis for this relief was his nonparentage,[873] and (4) CSED had a real interest in the paternity of the child because the mother had assigned to CSED her rights to support "from all sources."[874]

In another case involving the CSED, *State Department of Revenue v. Dunning*,[875] the supreme court held that the CSED exceeded its statutory authority by administratively creating a child support order independent and different from a child support court order of another state.[876] Under Alaska Statutes section 25.27.020(a)(7), CSED is "authorized to establish and enforce

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863. *Id.* at 578.
864. 902 P.2d 310 (Alaska 1995).
865. ALASKA R. CIV. P. 90.3.
866. ALASKA STAT. § 25.24.140(a)(3).
867. *Sanders*, 902 P.2d at 314.
868. *Id.* at 315 (quoting Sayne v. Sayne, 284 S.W.2d 309, 312 (Tenn. Ct. App. 1955)).
869. 902 P.2d 790 (Alaska 1995).
870. *Id.*
871. *Id.*
872. *Id.*; *see* ALASKA STAT. § 25.27.210 (1991), *amended by* 1995 SLA ch. 57 § 17; ALASKA STAT. § 25.27.270 (1991), *repealed by* 1995 SLA ch. 57 § 17.
873. *Allsop*, 902 P.2d at 794.
874. *Id.* at 794-95.
875. 907 P.2d 1 (Alaska 1995).
876. *Id.* at 7.

administratively . . . child support orders from other jurisdictions pertaining to obligors within the state."[877] The court rejected CSED's claim that this statute gave it the authority to establish an administrative order against an in-state obligor for child support despite the existence of a child support order against the same obligor from a different state.[878] The court ruled that "[n]othing in the language of the statute can be reasonably construed to confer upon CSED the power to create an independent order of a different amount against an in-state obligor when there is an existing out-of-state child support court order."[879]

In *State Department of Revenue v. Dean*,[880] the supreme court held that Alaska Statutes section 09.10.040,[881] the statute of limitations applicable to "an action upon a judgment,"[882] does not apply to a motion to reduce child support payments to judgment. The court concluded that the payments, which had accrued more than ten years earlier, were not subject to the statute of limitations because "the [Child Support Enforcement Division] did not initiate a new 'action' to establish [the defendant's] liability."[883] Instead, "each proceeding was an aid of enforcement of a judgment which was already in existence."[884] On remand, the Child Support Enforcement Division would be able to sustain its action against the defendants if it could show that it had satisfied the requirement in Alaska Statutes section 09.35.020[885] that there was "just and sufficient reasons for the failure to obtain the writ of execution"[886] in a more timely manner.[887]

XI. PERMANENT FUND DIVIDEND

In *Brodigan v. Alaska Department of Revenue*,[888] the Alaska Supreme Court held that the Alaska Department of Revenue acted within its statutory authority in adopting title 15, section 23.175 of

877. ALASKA STAT. § 25.27.020(a)(7) (1995).
878. *Dunning*, 907 P.2d at 4.
879. *Id.*
880. 902 P.2d 1321 (Alaska 1995).
881. ALASKA STAT. § 09.10.040 (1983).
882. *Dean*, 902 P.2d at 1322.
883. *Id.* at 1324.
884. *Id.*
885. ALASKA STAT. § 09.35.020 (1994).
886. *Id.*
887. *Dean*, 902 P.2d at 1325-26.
888. 900 P.2d 728 (Alaska 1995).

the Alaska Administrative Code,[889] pursuant to which absence from the state for medical treatment is not an allowable absence for the purposes of permanent fund dividend eligibility where the treatment includes a seasonal change of residence.[890] The court concluded that the regulation was both reasonable and consistent with the statutory purpose of Alaska Statutes section 43.23.095-(8)(D),[891] which is to ensure that payment of dividends is limited to permanent residents.[892] The court explained that the regulation, by excluding medical absences involving a seasonal change of residence, reasonably defines the statutory term "medical treatment" so that eligibility for dividends is limited to those permanent residents who are temporarily outside the state while actively attempting to treat their medical conditions.[893] In this case, the Brodigans were absent from Alaska for the majority of the year due to a physician's advice that Mr. Brodigan should spend colder winter months in a warmer climate.[894] The court noted that although "prolonged absence from Alaska can be appropriate when some 'specific therapeutic application by medical personnel' is necessary," medical treatment does not include "a seasonal absence from the state on the advice of one's doctor."[895]

In another case involving the effect of absence from the state on eligibility for dividend payments, *State Department of Revenue, Permanent Fund Division v. Bradley*,[896] the supreme court held that Alaska Administrative Code title 15, section 23.175(c)(2)[897] is consistent with Alaska Statutes section 43.23.095(8)(B).[898] Section 43.23.095(8)(B) allows those absent from the state to be residents for permanent fund dividend purposes if they are "absent only for . . . secondary or postsecondary education."[899] Section 23.175(c)(2) defines this to mean that the applicant must be enrolled full-time in an accredited institution.[900] Bradley, whose

889. ALASKA ADMIN. CODE tit. 15, § 23.175(c)(6) (repealed 1993).
890. 900 P.2d at 732.
891. ALASKA STAT. § 43.23.095(8)(D) (1990).
892. *Brodigan*, 900 P.2d at 732.
893. *Id.*
894. *Id.* at 731.
895. *Id.* (quoting the superior court opinion).
896. 896 P.2d 237 (Alaska 1995).
897. ALASKA ADMIN. CODE tit. 15, § 23.175(c)(2) (repealed 1993).
898. ALASKA STAT. § 43.23.095(8)(B) (1995).
899. *Id.*
900. *Bradley*, 896 P.2d at 238-39.

permanent fund dividend application was denied because he was a part-time student out-of-state, challenged this regulation because it excluded applicants, such as himself, whom he claimed fell within the literal language of the statute.[901] The court rejected this argument, noting that one of the duties in promulgating regulations is to give content to the statutory standard.[902] The regulation simply provided guidelines for determining whether or not an individual is absent from the state "only" for education.[903]

Bradley also claimed that the regulation was arbitrary because each school might have different definitions for "full-time student."[904] The court rejected this contention, holding that, as the regulation requires that the school be accredited, it ensures that the school's attendance standards will be legitimate.[905] Finally, the court held that a regulation is not unreasonable because it may possibly exclude a deserving applicant.[906]

In *State Department of Revenue v. Merriouns*,[907] the supreme court ruled that applicants for Permanent Fund Dividends had submitted satisfactory written opposition to the denial of their applications when they submitted a letter alleging that the untimely filing of their original applications with the Permanent Fund Dividend Division was attributable to "human error" on the part of the postal service.[908]

The supreme court also interpreted as non-exclusive the list of proof found in Alaska Administrative Code title 15, section 23.135(c), which provides that "[a]n application postmarked [after March 31 but before July 1 of the dividend year] is considered timely filed [if the applicant can produce certain listed forms of proof]."[909] The court permitted the applicants to submit two affidavits of persons who claimed to have witnessed the actual, timely mailing of their applications.[910]

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901. *Id.* at 239.
902. *Id.*
903. *Id.* at 239-40.
904. *Id.* at 240.
905. *Id.*
906. *Id.*
907. 894 P.2d 623 (Alaska 1995).
908. *Id.* at 625.
909. *Id.* at 627 (quoting ALASKA ADMIN. CODE tit. 15, § 23.135(c)(repealed Jan. 1993)).
910. *Id.*

XII. PROPERTY

In *Estate of Lampert v. Estate of Lampert*,[911] the Alaska Supreme Court held that a promisee is entitled to rescission of a postnuptial estate-planning agreement and restitution where there is total failure of consideration with respect to the postnuptial agreement. In the case, a wife's sole obligation under an agreement was to leave her husband a life estate in certain property.[912] However, she secretly changed her will so that her husband would not receive the life estate upon her death. The court determined that this breach went to the essence of the bargain.[913] Therefore, the husband's estate was entitled to rescission and to the restoration of all benefits conferred upon the estate of the wife.[914]

In *Kalenka v. Taylor*,[915] the supreme court addressed several issues related to the enforcement of restrictive covenants. A husband and wife had recorded restrictive covenants jointly as "developer" of a subdivision, and the wife sold several lots subsequent to a divorce. First, the court refined the standard for waiver of covenants adopted in *B.B.P. Corp. v. Carroll*,[916] which held that a covenant would be considered waived if the "evidence reveals substantial and general noncompliance."[917] The court found that failure to enforce the covenant against a single property does not constitute waiver under this standard.[918]

Second, the court applied a strict construction rule to covenants, interpreting them in favor of the free use of land. Thus, the court interpreted the covenants to permit the building of single family homes, even though the covenant clearly contemplated only duplexes, as single family homes were not expressly prohibited.[919]

With respect to damages for covenant breaches, the court held that breaches of covenant claims are essentially contractual in nature. Because punitive damages are unavailable in a contract

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911. 896 P.2d 214 (Alaska 1995).
912. *Id.* at 219.
913. *Id.*
914. *Id.* at 220.
915. 896 P.2d 222 (Alaska 1995).
916. 760 P.2d 519 (Alaska 1988).
917. *Kalenka*, 896 P.2d at 226 (quoting B.B.P. Corp. v. Carroll, 760 P.2d 519 (Alaska 1988)).
918. *Id.*
919. *Id.* at 227.

claim, they cannot be assessed for covenant breaches, even if the breach is wilful.[920] Finally, the court examined "assessed penalties" provisions of the covenants and concluded that they contemplated impermissible liquidated damages. The "assessed penalties" were impermissible because they did not attempt to calculate the actual damages that might be sustained by a breach. Instead, they assessed the same harsh penalties for a range of breaches.[921]

In *Sharpe v. Trail*,[922] the supreme court held that the determination of whether a landlord acted in good faith in evicting a tenant from a mobile home park must be made without an inquiry into the landlord's underlying motives.[923] Appealing from summary judgment that held that their eviction from a mobile home park was not wrongful, Jeff and Debbie Sharpe argued that a mobile home lot's conversion into a parking area was not a sufficient "change in the use of the land," a requirement for eviction under Alaska Statutes section 34.03.225.[924] They also argued that the eviction violated the good-faith-in-eviction requirement of Alaska Statutes section 34.03.320.[925]

The court affirmed the superior court's holding that the landlord's use of the land for parking commercial vehicles, travel trailers and recreational vehicles constituted "a change in the use of the land."[926] Without citing any authority, the court also held that "[u]nder the statutory definition of good faith, if the [landlord] honestly decided to change the use of [the land]—in other words, if they acted with 'honesty in fact' in undertaking the change in use—their underlying motives for doing so were immaterial."[927]

In *State v. Teller Native Corp.*,[928] the supreme court held that where the state, as lessee, specifically agrees to build improvements on certain leased property and leaves them there at the termination of the lease, the state must compensate the lessor for the value of

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920. *Id.* at 228.

921. *Id.* at 229.

922. 902 P.2d 304 (Alaska 1995).

923. *Id.* at 308.

924. *Id.* at 305-06. Alaska Statutes section 34.03.225 authorizes the owner of a mobile home park to evict a tenant if the owner desires to "make a change in the use of the land comprising the mobile home park." ALASKA STAT. § 34.03.225(a)(4) (1995).

925. *Sharpe*, 902 P.2d at 306; ALASKA STAT. § 34.03.320 (1995).

926. *Sharpe*, 902 P.2d at 307.

927. *Id.* at 308.

928. 904 P.2d 847 (Alaska 1995).

the improvements if the state condemns the property before the expiration of the lease.[929] In *Teller*, the state had leased certain property from the United States. As part of its consideration for the lease, the state agreed to build an airport on the site. Subsequently, the United States conveyed the leased property to the Teller Native Corporation ("TNC"). Seven years later, the state commenced proceedings to condemn land that included the lease property.[930]

The court determined that TNC was the successor to the United States's interest in the lease. The court also concluded that the state had agreed with the United States that the state would, in consideration for the lease, build the airport, and at the end of the lease, the United States would retain all unremovable improvements. Thus, the court concluded that TNC owned the improvements and should be compensated for their value.[931]

In *Nielson v. Benton*,[932] the supreme court held that where the state has a colorable claim over part of a parcel of land, it constitutes a cloud on the title regardless of its validity.[933] Benton had agreed to purchase Nielson's property but reserved the unconditional right to revoke the agreement if any clouds on the title were found.[934] The supreme court agreed with the superior court that where a lawsuit is necessary to determine title to a part of the property, there is a cloud on the title.[935] The court stated that the test for determining whether there is a cloud on the title is "whether the owner would be required to offer evidence to defeat an action based on the alleged cloud."[936] The court further stated that the "unconditional" power retained by Benton meant that he did not have to give Nielson an opportunity to cure title.[937]

In *Voss v. Brooks*,[938] the supreme court determined that a deed to real property made subsequent to a contrary oral contract

929. *Id.* at 850.
930. *Id.* at 849.
931. *Id.* at 853-54.
932. 903 P.2d 1049 (Alaska 1995).
933. *Id.* at 1052.
934. *Id.* at 1051.
935. *Id.* at 1052.
936. *Id.* at 1053.
937. *Id.*
938. 907 P.2d 465 (Alaska 1995).

nullified the oral agreement.[939] The dispute arose out of an alleged promise by Richard Voss to grant sole title to certain real property to Katherine Brooks if Brooks would move to Alaska and build on the property a house in which Voss, Brooks and Brooks's two children would live.[940] After construction on the house began in 1983, Voss executed a deed transferring the property to himself and Brooks as "joint tenants."[941] Brooks and Voss lived in the house together until 1988 when Voss moved out.[942] Voss was subsequently denied access to both the house and his personal property, and in 1991 he sued for partition of the property.[943] On appeal, the supreme court noted that under traditional principles of contract and property law, "rights under a contract to convey property are said to be merged into a subsequent deed."[944] The court explained that if an unambiguous deed contradicts a previous agreement, it is the deed that controls.[945] Applying the merger doctrine, the court held that Brooks's acceptance of the deed extinguished her rights under the oral agreement. Therefore Voss could proceed with his action for partition.[946]

In *K & L Distributors, Inc. v. Kelly Electric, Inc.*,[947] the supreme court concluded that, even where the language of a deed of trust is insufficient to give a deed of trust beneficiary a security interest in fixtures on the trusted real property, "the general common law rule is that '[w]hen a fixture becomes complemental to real property, it becomes . . . part of the realty, [and] the fixture becomes part of the security with regard to any existing [deed of trust].'"[948] In light of this rule, the court determined that the beneficiary of the deed of trust on the real property to which the fixtures were attached had a security interest in the fixtures that

939. *Id.* at 466.
940. *Id.*
941. *Id.* Under Alaska law, any attempt, such as this, by unmarried persons to create a joint tenancy in property, results in a tenancy in common. *Id.* at 468 n.2.
942. *Id.* at 467.
943. *Id.*
944. *Id.* at 468.
945. *Id.*
946. *Id.*
947. 908 P.2d 429 (Alaska 1995).
948. *Id.* at 432-33.

was superior to the interest of an unsecured creditor that had removed them from the premises.[949]

XIII. TAX

In *Kenai Peninsula Borough v. Associated Grocers, Inc.*,[950] the Alaska Supreme Court invalidated a municipal ordinance imposing personal liability for a former business owner's delinquent sales taxes on a successor owner who had taken possession of the business pursuant to a Chapter 11 bankruptcy reorganization plan.[951] The court relied on Alaska Statutes section 29.45.650(e),[952] which authorizes boroughs to create liens to secure payment of sales taxes, but gives priority to liens perfected prior to the recording of the sales tax lien.[953] The court held that although the municipal ordinance did not specifically impose a lien, its impact was even more drastic than a lien, thus violating the lien priorities of Alaska Statutes section 29.45.650(e)(2).[954] The court

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949. *Id.* at 433. The court determined that the items removed were "fixtures" by applying a three-factor test outlined in Hayes v. Alaska Juneau Forest Industries, Inc., 748 P.2d 332, 336 (Alaska 1988). Under this test, the court considered (1) the manner in which the items were attached to the property, (2) the adaptability of the items "to the use to which the realty is applied," and (3) the intention of the party making the attachment. *K & L Distributors*, 908 P.2d at 432.

950. 889 P.2d 604 (Alaska 1995).

951. *Id.* at 607. The ordinance at issue, KENAI PENINSULA BOROUGH ORDINANCE, AK., § 5.18.130(B), provides in relevant part:

> Any person acquiring an ownership interest in an ongoing business . . . whether by purchase, foreclosure, or otherwise, shall be liable for the payment of taxes, penalties and interest accruing and unpaid to the borough on account of operation of the business by the former owner . . . .

889 P.2d at 605 (quoting KENAI PENINSULA BOROUGH ORDINANCE, AK., § 5.18.130(B)).

952. Alaska Statutes section 29.45.650(e) provides:

> (e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales and use tax, and the interest, penalties, and administration costs in the event of delinquency. When recorded, the sales tax lien has priority over all other liens except (1) liens for property taxes and special assessments; (2) liens that were perfected before the recording of the sales tax lien for amounts actually advanced before the recording of the sales tax lien; (3) mechanics' and materialmen's liens . . . recorded before the recording of the sales tax lien.

ALASKA STAT. § 29.45.650(e)(2) (1992).

953. *Id.*

954. *Kenai Peninsula Borough*, 889 P.2d at 606.

reasoned that abrogation of the lien priorities was neither specifically allowed under title 29 of the Alaska Statutes nor "necessarily or fairly implied in or incident to the purpose of all powers and functions conferred" therein.[955] The court refused to rule on whether a municipality could adopt a successor liability ordinance consistent with the successor's perfected lien priority.[956]

In *United States v. Matanuska-Susitna Borough*,[957] the supreme court held that real properties foreclosed upon by state or federal agencies and held for resale are subject to local property taxation as properties "retained as an investment" under Alaska Statutes section 29.45.030(a)(1)(B).[958] The Federal Farmers Home Administration ("FFHA") challenged Alaska boroughs' property tax assessments on properties that had been foreclosed upon by FFHA, arguing that the FFHA had not retained the properties for investment.[959] The court disagreed, noting that the agency makes an investment in the property by loaning money on the real property.[960] The court concluded that foreclosure and resale of property is a method used by the FFHA to protect these investments. Thus, property held for resale comes within the definition of "retained as an investment."[961]

XIV. TORTS

In *Hawks v. State*,[962] the Alaska Supreme Court declined to impose liability on the state for negligence in identifying the remains of a murder victim.[963] The court upheld the superior court's grant of summary judgment to the state in a suit resulting from a five-year delay in identifying the remains of appellant Hawks's daughter.[964] The court held that Hawks failed to state a claim for negligent infliction of emotional distress because the state police did not owe her a duty of care to conduct its investiga-

955. *Id.* (citing Fairbanks North Star Borough v. Howard, 608 P.2d 32, 33-34 (Alaska 1980)).
956. *Id.* at 607 n.8.
957. 906 P.2d 1386 (Alaska 1995).
958. *Id.* at 1391.
959. *Id.* at 1386-87.
960. *Id.* at 1389.
961. *Id.*
962. 908 P.2d 1013 (Alaska 1995).
963. *Id.* at 1017.
964. *Id.* at 1015.

tion non-negligently.[965] The court determined that, although injury to the plaintiff was foreseeable, the public consequences of imposing a duty strongly militated against doing so.[966] The court noted that imposing liability would prompt a torrent of litigation concerning body identifications and would result in the diversion of police resources from other projects and investigations.[967]

In *Zok v. State*,[968] the supreme court held that it constitutes plain error for a court to fail to give a nominal damages instruction to the jury in a false arrest case.[969] Moreover, the court held that this type of error is reviewable even when the victim of false arrest does not object until after the jury has retired.[970] The court noted that recovery of nominal damages is important for the fact, not the amount, of the award.[971] However, the court held that because the error could be corrected by the court as a matter of law and because there would be no harm in correcting the verdict after the jury had been discharged, a new trial was not necessary.[972] Instead, the court remanded the case for entry of a nominal damage award of one dollar.[973]

In *Burcina v. City of Ketchikan*,[974] the supreme court reaffirmed the public policy principle that bars a person who has been convicted of a crime from imposing liability on others for the consequences of that antisocial conduct.[975] The plaintiff was undergoing outpatient mental health care with a department of the City of Ketchikan when he set fire to the city's mental health drop-in center.[976] After being convicted of arson, the plaintiff filed suit against the mental health clinic claiming he received negligent treatment, which aggravated his mental illness and caused him to

965. *Id.* at 1016-17.
966. *Id.*
967. *Id.* at 1017.
968. 903 P.2d 574 (Alaska 1995).
969. *Id.* at 578.
970. *Id.*
971. *Id.*
972. *Id.* at 579.
973. *Id.*
974. 902 P.2d 817 (Alaska 1995).
975. *Id.* at 821.
976. *Id.* at 819.

set the fire.[977] The court found that the plaintiff's claim was barred by public policy.[978]

In *Gunderson v. University of Alaska*,[979] the supreme court refined its application of the *Noerr-Pennington* doctrine,[980] which immunizes litigants from antitrust liability where they have attempted to influence governmental processes to a competitor's disadvantage. The supreme court determined that a party's commission of misrepresentation or fraud during the judicial process does not automatically render its lawsuit a "sham"—defined as a mere attempt to interfere directly with the business relationships of a competitor—which precludes *Noerr-Pennington* immunity.[981] Rather, the court ruled that courts must still apply the two-part *Columbia Pictures* test[982] in order to determine whether the party's lawsuit constitutes a "sham."[983] Under the *Columbia Pictures* test, a party is denied immunity if its lawsuit (1) is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"[984] and (2) conceals "an attempt to interfere directly with the business relationships of a competitor."[985]

Gunderson had brought suit against Alaska Railroad Corporation ("ARC"), claiming that it had tortiously interfered with its contract to deliver coal to the University of Alaska when it protested against and secured the nullification of the contract through an administrative hearing. Gunderson argued that ARC engaged in fraud and misrepresentation at the hearing, thereby automatically rendering its protest a "sham." The court rejected this argument and followed the decision of the U.S. Court of Appeals for the Ninth Circuit's in *Liberty Investors, Inc. v. Magnuson*,[986] in holding that a party alleging fraud and misrepre-

977. *Id.*
978. *Id.*
979. 902 P.2d 323 (Alaska 1995).
980. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).
981. *Gunderson*, 902 P.2d at 329.
982. *See* Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).
983. *Gunderson*, 902 P.2d at 328.
984. *Id.*
985. *Id.* (quoting *Noerr Motor Freight*, 365 U.S. at 144).
986. 12 F.3d 155 (9th Cir. 1993).

sentation in the course of litigation must still satisfy the *Columbia Pictures* test to deny its adversary immunity.[987] The Alaska Supreme Court found that Gunderson's allegations failed the test, because the success of ARC's protest showed its legitimacy.[988] The court therefore upheld the lower court's grant of summary judgment in favor of ARC.

In *Estate of Arrowwood v. State*,[989] the supreme court held that Alaska's failure to close an icy stretch of highway was a "discretionary function" for which the state is immune from tort liability under Alaska Statutes section 90.50.250(1).[990] In order to determine whether discretionary function immunity was applicable, the court applied a "planning level-operational test"[991] under which immunity applies if the formulation of policy (planning) is involved. Immunity does not apply if the implementation of policy (an operational decision) is involved.[992] The court reasoned that, in the case of a road closure, an official is making a decision on the scene rather than carrying out a predetermined policy. Thus, the official was engaged in policy formulation, not policy implementation, and discretionary function immunity arose.[993]

The court also held that the superior court did not abuse its discretion by excluding evidence relating to the effect of budget reductions upon the level of highway maintenance.[994] Because budget decisions are also discretionary functions, the court reasoned they were immune from judicial inquiry and, thus, the evidence was properly excluded.[995]

In *Sweet v. Sisters of Providence in Washington*,[996] the supreme court held that in a medical malpractice case, a rebuttable presumption of medical negligence and causation is raised against the defendant if the defendant negligently alters or loses medical records important to the plaintiff's malpractice claim. Moreover, this rebuttable presumption operates to shift the burden of proof

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987. *Gunderson*, 902 P.2d at 329.
988. *Id.*
989. 894 P.2d 642 (Alaska 1995).
990. *Id.* at 646; ALASKA STAT. § 09.50.250(1) (1994).
991. *Arrowwood*, 894 P.2d at 645.
992. *Id.* at 644-45.
993. *Id.* at 645-46.
994. *Id.* at 646.
995. *Id.*
996. 895 P.2d 484 (Alaska 1995).

to the defendant to prove the nonexistence of the facts presumed.[997] In this case, Jacob Sweet, the newborn child of Gary and Beverly Sweet, allegedly sustained brain damage caused by the negligence of the hospital and doctor that treated Jacob.[998] The hospital was unable to locate several hospital records that the Sweets claimed were critical to their case.[999]

The supreme court adopted the approach of the Florida Supreme Court in *Trust v. Valcin*,[1000] and held that the rebuttable presumption arises if the court determines that the missing records are important to the plaintiff's case and the records are missing due to the negligence or fault of the defendant.[1001] The court determined that although the trial court shifted the burden with respect to the issue of whether the defendant had breached a duty, it incorrectly failed to shift the burden relating to the causation issue. However, the supreme court determined that the lower court's error was harmless because the jury had found no breach of duty; thus, the jury never reached the causation issue.[1002]

The supreme court also held that before a judge can instruct a jury that a regulation[1003] provides a basis for holding a doctor per se negligent for failing to get written consent, the judge must hold an evidentiary hearing to determine whether the regulation is "obscure" and unknown in the medical community.[1004] During this hearing, the trial court must determine whether the alleged conduct falls within the scope of the statute or regulation by applying the criteria set out in section 286 of the Restatement (Second) of Torts.[1005] However, the court noted that even if the section 286 criteria were met, the court might refuse to find the statute or regulation to be the basis for per se negligence if the statute or regulation were "so obscure, unknown, outdated, or arbitrary as to make its adoption as a standard of reasonable care inequitable."[1006] The supreme court remanded the case to the

997. *Id.* at 490-92.
998. *Id.* at 486.
999. *Id.* at 487.
1000. 507 So.2d 596 (Fla. 1987).
1001. *Sweet*, 895 P.2d at 491.
1002. *Id.* at 492.
1003. ALASKA ADMIN. CODE tit. 7, § 12.120 (July 1993)(requiring informed consent to be in writing).
1004. *Sweet*, 895 P.2d at 494.
1005. RESTATEMENT (SECOND) OF TORTS § 286 (1965); *Sweet*, 895 P.2d at 493.
1006. *Sweet*, 895 P.2d at 493.

trial court for a determination of whether the regulation at issue was "obscure."[1007]

In *Myers v. Robertson*,[1008] the supreme court held that according to Alaska's wrongful death statute,[1009] sufficient adversity existed for a court to have subject matter jurisdiction over a claim by an estate in a wrongful death action against the estate's beneficiaries.[1010] The case established as a matter of first impression in Alaska that in a wrongful death action the estate's beneficiaries are not the "true plaintiffs" where any potential recovery will be paid to the estate and not directly to individual beneficiaries.[1011] The court reasoned that its conclusion did not violate the public policy that a negligent party should not benefit from his wrongdoing because the negligent beneficiaries would be deemed to have renounced their right to recovery according to Alaska Statutes section 13.11.295.[1012]

In *Chizmar v. Mackie*,[1013] the supreme court reversed the superior court's holding that a plaintiff can recover damages for negligent infliction of emotional distress only when the negligent behavior resulted in an accompanying physical injury.[1014] While the superior court's decision was consistent with the traditional rule, the supreme court decided to abandon the physical injury requirement in situations where the "damages are foreseeable and severe, and arise from circumstances in which the defendant owes the plaintiff a preexisting duty to refrain from causing distress."[1015] Applying this standard, the court found that a reasonable jury could conclude that a misdiagnosis of AIDS could foreseeably cause severe emotional distress and that a doctor had a duty of care to a patient.[1016] Because Dr. Scott Mackie owed this duty of care to Savitri Chizmar and misdiagnosed Chizmar with

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1007. *Id.* The supreme court also found that plaintiff had no claim for negligent spoliation of evidence because the burden shifting with respect to the issues of breach of duty and causation was a "sufficient" remedy for the loss of the medical records. *Id.* at 493.

1008. 891 P.2d 199 (Alaska 1995).

1009. ALASKA STAT. § 09.55.580 (1962).

1010. *Myers*, 891 P.2d at 206.

1011. *Id.* at 205.

1012. *Id.* at 207; ALASKA STAT. § 13.11.295 (1984).

1013. 896 P.2d 196 (Alaska 1995).

1014. *Id.* at 201.

1015. *Id.* at 214.

1016. *Id.* at 205.

AIDS, the court remanded the claim for negligent infliction of emotional distress.[1017]

In the Estate of Day v. Willis,[1018] the supreme court held that a police officer engaged in a high speed chase did not have a legal duty of care to protect the suspects involved in the chase from their own actions.[1019] The court examined whether public policy established a legal duty of care by reviewing the considerations it had set forth in *D.S.W. v. Fairbanks North Star Borough School District*.[1020] The court determined that no legal duty existed despite a close nexus between the pursuit of the offender and the risk of an accident.[1021] The creation of such a duty would violate public policy by, among other things, failing to take into account the blameworthiness of the offenders' conduct.[1022]

In *Palmer G. Lewis Co. v. ARCO Chemical Co.*,[1023] the supreme court refined the rule of *Heritage v. Pioneer Brokerage and Sales, Inc.*[1024] to conclude that the supplier of a defective product who is liable on a theory of strict liability is entitled to indemnity from the manufacturer of the product if the supplier can prove that the product was defective when it was acquired from the manufacturer.[1025] *Heritage* held that a supplier is "entitled to indemnity when it settles a case if it would have been entitled to indemnity had it tried the case and lost."[1026] However, the *ARCO Chemical* court pointed out that only the issue of attorney's fees was before the *Heritage* court; the manufacturer's indemnity liability had already been established.[1027] The court distinguished

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1017. *Id.*

1018. 897 P.2d 78 (Alaska 1995).

1019. *Id.* at 82.

1020. 628 P.2d 554 (Alaska 1981). The considerations were the following:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Id. at 555.

1021. *Estate of Day*, 897 P.2d at 82.

1022. *Id.*

1023. 904 P.2d 1221 (Alaska 1995).

1024. 604 P.2d 1059 (Alaska 1984).

1025. *ARCO Chemical*, 904 P.2d at 1225.

1026. *Id.*

1027. *Id.*

ARCO Chemical from *Heritage* because in *ARCO Chemical*, the manufacturer's liability had not been established. Therefore, the court concluded that the supplier would not be entitled to indemnity under *Heritage* unless it could show that the manufacturer had sold it defective products.[1028]

The court also recognized for the first time that the Restatement (Second) of Conflicts is persuasive in resolving conflicts of laws issues relating to contracts.[1029] Applying Restatement principles, the court looked to the places of contracting, negotiation and performance of the contract. Because all three occurred in Washington State, the court concluded that Washington law governed the contract.[1030]

XV. TRUSTS AND ESTATES

In *In re Estate of Evans*,[1031] the Alaska Supreme Court held that notice of the disallowance of a claim against an estate must be "clear and unequivocal"[1032] to bar it under Alaska Statutes section 13.16.475(a).[1033] The estate's attorney sent a letter to certain claimants stating that more information was needed to advise the personal representative in making a determination of the claim.[1034] The letter also suggested a disallowance, stating that "it would be safer to disallow the claim" and mentioning that the claim would be barred after sixty days under Alaska Statutes section 13.16.475(a).[1035] The court stated that the letter did not provide clear and unequivocal notice because it "[did] not contain a 'flat out rejection,' but rather contemplated further consideration

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1028. *Id.*
1029. *Id.* at 1227.
1030. *Id.*
1031. 901 P.2d 1138 (Alaska 1995).
1032. *Id.* at 1140.
1033. Section 13.16.475(a) states in relevant part:

> [T]he personal representative may mail a notice to any claimant stating that the claim has been disallowed .... Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

ALASKA STAT. § 13.16.475(a) (1994).
1034. *In re Estate of Evans*, 901 P.2d at 1139.
1035. *Id.*

of the . . . claim."[1036] The court also rejected the estate's contention that the claimants should have been put on inquiry notice, stating that such an argument would frustrate the purpose of the statute by encouraging estates to hint at disallowance without clearly communicating it.[1037] The court remanded the case to determine whether the claimants had actual notice of the disallowance, reasoning that if the claimants had actual notice, the claim would be time-barred.[1038]

In *First National Bank v. State Office of Public Advocacy*,[1039] the supreme court affirmed the superior court's decision that a court-appointed guardian for the settlor of a trust could exercise the power reserved by the settlor to remove the trustee upon written notice.[1040] The Office of Public Advocacy ("OPA") appointed by court order as the settlor's guardian, obtained a court order removing First National Bank of Anchorage as trustee.[1041] First National unsuccessfully argued that the order was void because the statutory procedures for removal of a trustee had not been followed.[1042] The supreme court stated that under the terms of the trust and the previous order appointing OPA as the settlor's guardian, OPA had explicit authority to remove the trustee without application to the court. Therefore, the statutory procedures for removing a trustee did not apply.[1043]

1036. *Id.* at 1142.
1037. *Id.* at 1143.
1038. *Id.*
1039. 902 P.2d 330 (Alaska 1995).
1040. *Id.* at 334.
1041. *Id.* at 331.
1042. The court noted that Alaska Statutes section 13.06.110 "vests the superior court with exclusive jurisdiction over proceedings initiated by interested parties concerning the internal affairs of trusts." *First National Bank*, 902 P.2d at 334 (citing ALASKA STAT. § 13.06.110 (1985)). The proceeding is initiated by a filing of a petition under Alaska Statutes section 13.36.035 and giving notice under Alaska Statutes Section 13.06.110. ALASKA STAT. §§ 13.36.035, 13.06.110 (1985).
1043. *First National Bank*, 902 P.2d at 334. The court relied on Alaska Statutes section 13.36.035, which states in relevant part: "The management and distribution of a trust estate . . . shall proceed expeditiously consistently with the terms of the trust, free of judicial intervention and without order, approval or other action of any court . . . ." ALASKA STAT. § 13.36.035(b) (1985).

APPENDIX

CASES OMITTED FROM YEAR-IN-REVIEW

ADMINISTRATIVE LAW

Dominish v. State, 907 P.2d 487 (Alaska 1995)

(holding that the Commercial Fisheries Entry Commission did not err in refusing to consider the aggregate significance of (1) a fishing license applicant's medical problems and (2) the fact that the applicant's application was one day late when the Commission rejected the applicant's request for "past participation points," which would have enhanced the applicant's chances of receiving certain fishing licenses).

Glascock v. State Dep't of Pub. Safety, 890 P.2d 65 (Alaska 1995)

(holding that the Alaska Division of Motor Vehicles properly used prior a conviction for driving while intoxicated ("DWI"), which was reflected in an authenticated copy of a motorist's out-of-state driving record, to enhance the period of the motorist's administrative license revocation for a subsequent DWI offense committed in Alaska).

BUSINESS LAW

University of Alaska v. Thomas Architectural Prod., 907 P.2d 448 (Alaska 1995)

(holding that, under Washington State law, failure of a dissolved corporation to comply with windup requirements makes it susceptible to suits by known creditors who did not receive notice of the dissolution).

Neal & Co. v. Association of Village Council Presidents Regional Hous. Auth., 895 P.2d 497 (Alaska 1995)

(holding that contract language placed responsibility for the provision of electrical power during construction on a contractor and that a general contractor was not an intended third-party beneficiary of a contract between the Village Council Presidents Regional Housing Authority and the U.S. Department of Housing and Urban Development).

FAMILY LAW

A.H. v. W.P., 896 P.2d 240 (Alaska 1995)

(holding that (1) a trial court did not improperly rely on stigma related to a mother's mental impairment in modifying a child

custody order and (2) an order requiring the mother to pay child support based on her earning capacity prior to the manifestation of her mental disability was an abuse of discretion).

A.M. v. State, 891 P.2d 815 (Alaska 1995)

(holding that (1) the absence of a "psychological parent" bond is not, standing alone, enough to show the destruction of the parent-child relationship, which constitutes abandonment, and (2) parental rights cannot be terminated due to the incarceration of a parent because incarceration does not show that the child is in need of aid as a result of "parental conduct which is likely to continue").

Davila v. Davila, 908 P.2d 1027 (Alaska 1995)

(holding that superior court had not abused its discretion in failing to award a wife spousal support or attorney's fees and in assigning her the cost of her medical expenses).

McQueary v. McQueary, 902 P.2d 1326 (Alaska 1995)

(holding that a superior court's calculation of the present value of a marital ranch was clearly erroneous).

McQuade v. McQuade, 901 P.2d 421 (Alaska 1995)

(affirming a superior court's decision to award child custody to plaintiff's ex-wife, even though she had decided to move out of the state).

Moore v. Moore, 893 P.2d 1268 (Alaska 1995)

(holding that a mother's monthly mortgage payments could be included in her family expenses when calculating the father's child support obligation).

Morris v. Morris, 908 P.2d 425 (Alaska 1995)

(denying relief from the assignment of 90% of an ex-husband's federal workers' compensation benefits to his former wife).

Nass v. Seaton, 904 P.2d 412 (Alaska 1995)

(holding that gifts to a father from his parents should not be considered as income when determining a father's child support obligation).

Waggoner v. Foster, 904 P.2d 1234 (Alaska 1995)

(holding that in determining whether to modify a divorce decree to reflect the parties' agreement that the ex-husband could claim the parties' five children as dependents for income tax purposes, the trial court must consider whether such an arrangement was in the best interests of the children).

Wright v. Wright, 904 P.2d 403 (Alaska 1995)

(upholding a divorce decree made by the superior court).

CIVIL PROCEDURE

In re Estate of Katchatag, 907 P.2d 458 (Alaska 1995)

(holding that a fee-sharing arrangement between two attorneys was not enforceable because it was not in writing and was not approved by the client).

In re McNally, 901 P.2d 415 (Alaska 1995)

(holding that a district attorney's failure to appear at a court hearing was a violation of Rule 3.4(c) of the Alaska Rules of Professional Conduct for which a monetary sanction under Alaska Rule of Civil Procedure 95(b) was appropriate).

Gamble v. Northstore Partnership, 907 P.2d 477 (Alaska 1995)

(holding that a superior court abused its discretion when it refused to grant property owners additional time to oppose an easement owner's summary judgment motion).

Shade v. Co & Anglo Alaska Serv. Corp., 901 P.2d 434 (Alaska 1995)

(holding that summary judgment was improperly granted in a negligence case where the defendant failed to show the absence of a factual dispute as to whether defendant breached a duty of care to the plaintiff).

EMPLOYMENT LAW

Alaska Pulp Corp. v. Trading Union, 896 P.2d 235 (Alaska 1995)

(holding that when an employee injures his shoulder while working for an employer, subsequently changes jobs and reinjures the shoulder while working for a second employer, the first employer remains responsible for paying workers' compensation benefits associated with the initial injury, and the second employer must pay benefits only insofar as they relate to the reinjury).

Bishop v. Municipality of Anchorage, 899 P.2d 149 (Alaska 1995)

(holding that an employee's insubordination on an inconsequential matter gave an employer just cause to dismiss the employee and was not a pretext for dismissing the employee for exercising his First Amendment rights).

Cluff v. Nana-Marriott, 892 P.2d 164 (Alaska 1995)

(holding that in a workers' compensation case, the presumption of compensability applies to the general employer rather than a prospective employer, even where the injury was caused by testing administered by the prospective employer).

Cozzen v. Municipality of Anchorage, 907 P.2d 473 (Alaska 1995)

(holding that a plaintiff's failure to exhaust all of the contractual remedies available barred suit against an employer for wrongful discharge).

Haroldsen v. Omni Enter., 901 P.2d 426 (Alaska 1995)

(holding that an employee terminated during a reduction in the employer's work force who sues the employer for race discrimination need not establish as part of a prima facie case of pretext that he or she possessed greater qualifications than a retained employee).

Helmuth v. University of Alaska-Fairbanks, 908 P.2d 1017 (Alaska 1995)

(holding that an administrative hearing officer's finding of insubordination justifying termination, based on employee's refusal to write a memorandum, was supported by substantial evidence).

Jonathan v. Doyan Drilling, Inc., 890 P.2d 1121 (Alaska 1995)

(holding that the statute of limitations on workers' compensation claims is not tolled until the employer responds to the employee's written request for benefits).

Prazak v. Alaska Local No. 1, Int'l Union of Bricklayers and Allied Craftsmen, 904 P.2d 428 (Alaska 1995)

(holding that cases retain fast track status after consolidation if they are assigned that status prior to consolidation, and they may not be dismissed by a court without following the mandatory dismissal procedures for fast track cases).

CRIMINAL LAW

Anderson v. State, 904 P.2d 433 (Alaska Ct. App. 1995)

(holding that counting simultaneous convictions of prior multiple felonies as separate convictions for presumptive sentencing purposes does not violate the equal protection clause of the Alaska Constitution).

Beltz v. State, 895 P.2d 513 (Alaska Ct. App. 1995)

(holding that evidence of a wife's violent behavior toward her husband when he disputed the custody of their child was improperly excluded in a child sexual abuse case against the husband, as it was highly probative impeachment evidence of wife's motive to encourage the child to fabricate stories of molestation by husband).

Clum v. State, 893 P.2d 1277 (Alaska Ct. App. 1995)

(holding that a prosecutor's closing argument gave rise to grounds for reversible error where the prosecutor suggested that the defendant's failure to call a witness was evidence of deception by the defense with respect to other evidence).

DeJesus v. State, 897 P.2d 608 (Alaska Ct. App. 1995)

(holding that a defendant made a prima facie case of ineffectual assistance of counsel by showing that counsel provided defendant with incorrect sentencing information).

Evan v. State, 899 P.2d 926 (Alaska Ct. App. 1995)

(holding that with a relaxed hearsay rule in sentencing, the state may rely on hearsay evidence unless the defendant presents testimony creating a real indication that the hearsay statements are inaccurate).

Halberg v. State, 903 P.2d 1090 (Alaska Ct. App. 1995)

(holding that where defendant's *Miranda* rights are violated during a first interview by police, statements made in subsequent interviews are admissible if the decision to submit to those interviews was made freely enough to remove the taint of the *Miranda* violation in the first interview).

Harmon v. State, 908 P.2d 434 (Alaska Ct. App. 1995)

(holding that DNA evidence was properly admissible under the *Frye* test and rejecting the argument that "population substructures" make the results unreliable).

Jordan v. State, 895 P.2d 994 (Alaska Ct. App. 1995)

(holding that evidence of prior criminal records of two passengers in a stolen car, which the defendant argued would impeach their statements that he was the driver, were properly excluded where the passengers did not testify and their statements were not offered as hearsay).

Kitchens v. State, 898 P.2d 443 (Alaska Ct. App. 1995)

(remanding case to the trial court for a new sentencing hearing where the trial court in imposing the original sentence mistakenly believed that it had to impose consecutive sentences for two sexual assaults when, in fact, it was in the court's discretion to impose the sentences consecutively or concurrently).

Linton v. State, 901 P.2d 439 (Alaska Ct. App. 1995)

(declining to determine whether the court would adopt the same interpretation of Alaska Rule of Evidence 804(b)(3) as the U.S. Supreme Court's interpretation of the corresponding federal rule because the defendant failed to raise the issue in the trial court).

Nagasiak v. State, 890 P.2d 1134 (Alaska Ct. App. 1995)

(holding that (1) trial judges have substantial discretion when evaluating sentencing goals and (2) the trial court had not abused its discretion in imposing a sentence of nine years imprisonment with six years suspended on a defendant convicted of second-degree child abuse).

Simmons v. State, 899 P.2d 931 (Alaska Ct. App. 1995)

(holding that double jeopardy barred the entry of judgment against a defendant on more than one count of being a felon in possession of a firearm where the evidence did not show two separate violations but rather one continuous possession of the firearm).

Smith v. State, 892 P.2d 202 (Alaska Ct. App. 1995)

(holding that a sentencing order may not grant double credit for time served against sentences that had to run consecutively but

that the trial court had authority to reduce the sentence taking into account the additional time to be spent in prison because the credit could be counted only once).

Toomer v. State, 890 P.2d 598 (Alaska Ct. App. 1995)

(holding that in a trial for theft, evidence of a defendant's cocaine conviction introduced to establish motive for the theft was improperly admitted where a "particularized connection" between the drug use and the charged offense had not been established).

Turpin v. State, 890 P.2d 1128 (Alaska Ct. App. 1995)

(holding that a defendant waives his ability to claim mistrial by failing to object to events occurring during a trial until after an adverse verdict is returned).

PROPERTY

Bowman v. Blair, 889 P.2d 1069 (Alaska 1995)

(holding that a mother seeking the return of property allegedly owned by her adult son who died intestate had the burden of proving that the decedent owned the property at the time of his death and determining that a probate master's findings relating to the ownership of such property was not clearly erroneous).

Carr-Gottstein Properties v. State, 899 P.2d 136 (Alaska 1995)(per curiam).

Keener v. State, 889 P.2d 1063 (Alaska 1995)

(holding that the right-of-way for roads on lands conveyed by the government must be fifty feet, even though a subsequently issued patent called for an easement of only thirty feet).

Marlow v. Municipality of Anchorage, 889 P.2d 599 (Alaska 1995)

(holding that an Anchorage rezoning ordinance does not require a developer to extend utilities to the boundary of adjacent property).

TAX

Katmailand, Inc. v. Lake & Peninsula Borough, 904 P.2d 397 (Alaska 1995)

(holding that a borough's tax does not violate federal or state equal protection or due process guarantees where the tax is imposed on professional guides on a per-visitor basis and on lodge owners on a per-room basis).

TORTS

Mount Juneau Enter. v. Juneau Empire, 891 P.2d 829 (Alaska 1995)

(holding that a developer who sought public approval for a construction project is a "public figure" as to the project and

must show actual malice in order to prevail on a defamation claim brought against the author of a newspaper article that described matters relating to the project in an unfavorable light).

TRUSTS AND ESTATES

Carroll v. Carroll, 903 P.2d 579 (Alaska 1995)

(holding that an estate beneficiary waived her objection to the sale of stock in a closely held corporation by failing timely to oppose the motion for approval of the sale).